COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12449

MIRAMAR PARK ASSOCIATION, et al.,

Plaintiffs-Appellees

v.

TOWN OF DENNIS,

Defendant-Appellant

On Appeal from an Order of the
Superior Court

BRIEF OF DEFENDANT-APPELLANT TOWN OF DENNIS

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TABLE OF CONTENTS

Argument

Table of Authorities

Page

Cases

Statutes

Regulations

Rules of Procedure

STATEMENT OF ISSUES

1. Whether the Superior Court erred in issuing an injunction requiring the Town to take actions that are in conflict with applicable state statutes and regulations and which interferes with the exercise of executive discretion.
2. Whether the Superior Court erred in finding that the Town violated 310 CMR 10.27(c)(4).
3. Whether the Superior Court erred in finding that the Town is causing or about to cause damage to the environment.

STATEMENT OF THE CASE

By this action, the plaintiffs, Miramar Park Association, Inc., a neighborhood association and several of its members (hereinafter collectively referred to as the plaintiffs), sought injunctive relief pursuant to G.L. c. 214, §7A to enjoin the defendant, the Town of Dennis (hereinafter referred to as the "Town"), from dredging the mouth of the Swan Pond River so as to improve tidal flow therein due to alleged impacts on the plaintiffs' private beach. (App. 013-035).[1]

More specifically, the plaintiffs claimed that the Town's dredging project was causing or about to cause damage to the environment because the Town used material

[1] The Appendix will be cited as: (App. page number).

removed from the mouth of the river to provide nourishment to public beaches in the Town, instead of using such material to restore the plaintiffs' private beach, which the plaintiffs claim is suffering erosion as a result of a jetty built many decades earlier. (App. 013-035). The plaintiffs further claimed that the Town's dredging project is in violation of a regulation of the Department of Environmental Protection, 310 CMR 10.27(4)(c), relative to dredging in connection with jetty construction projects. (App. 013-035). The plaintiffs sought an injunction to prevent the Town from dredging Swan Pond River unless the Town deposited the dredge materials on the plaintiffs' private beach, which they argued was required by the above regulation. (App. 013-035).

The plaintiffs initiated this litigation in Barnstable Superior Court in the case captioned Miramar Park Associates, Inc. v. Town of Dennis, C.A. No. 1472CV00438, and moved for a preliminary injunction to enjoin the Town from proceeding with a planned and duly permitted 2014 dredging project. (App. 013-035). (App. 011-035). After the plaintiffs' Motion for Preliminary Injunction was denied, and the dredging project was completed, the plaintiffs' moved for summary judgment and sought a permanent injunction to enjoin the Town from engaging in

any further dredging of the Swan Pond River unless the materials dredged are deposited onto their private beach. (App. 011-012, 094-112). The Town cross-moved for summary judgment, arguing, in part, that the relief sought by the plaintiffs conflicted with applicable statutes and regulations concerning the use of dredge materials and that the regulation relied upon by the plaintiffs was not triggered by the Town's dredging projects because that regulation only applied to jetty construction projects. (App. 164-187).

In ruling on the parties' cross-motions for summary judgment, the Superior Court (Moriarty, II, J.) correctly ruled that 310 CMR 10.27(4)(c) did not apply to the Town's dredging projects because it only applied to the construction of jetties. (App. 693-709). As neither the plaintiffs' Complaint nor their Motion for Summary Judgment were predicated on the Town's construction of the jetty (which was constructed many decades earlier by parties unknown), this finding should have resulted in a judgment in favor of the Town.

The Superior Court, however, found that the plaintiffs established a right to relief pursuant to G.L. c. 214, §7A on the basis of a claim raised for the first time in their Opposition to the Town' Cross-Motion for Summary Judgment.

(App. 693-709). Specifically, the Superior Court found that 310 CMR 10.27(4)(c) was triggered by a jetty restoration project that occurred sometime in the 1990's, and that the Town violated the regulation by not periodically re-nourishing the plaintiffs' private beach. (App. 693-709).

By decision dated January 24, 2017, the Superior Court (Moriarty, J.) granted the plaintiffs' motion for summary judgment and denied the Town's cross-motion (the "Order"). (App. 693-709). In so ruling, the Superior Court "**ADJUDGED** and **DECLARED** that the Town is obligated to periodically dredge Swan Pond River to re-nourish Miramar Beach pursuant to 310 Code Mass. Regs. § 10.27(4)(c). It is further **ORDERED** that the Town of Dennis is **PERMANENTLY ENJOINED** from violating 310 Code Mass. Regs. § 10.27(4)(c) and must comply with that regulation forthwith." (App. 693-709).

Judgment entered in favor of the plaintiffs on February 17, 2017. (App. 690-692). The Town timely filed its notice of appeal on March 15, 2017. (App. 005-012).

STATEMENT OF FACTS

Background

The Town of Dennis is a coastal community located on Cape Cod. (App. 369). The Town operates nineteen public beaches and is responsible for maintaining four waterways, including the Swan Pond River (the "River"). (App. 371,

398). The mouth of the River is located at the shoreline where it discharges into Nantucket Sound. (App. 014, 345).

A stone jetty is located perpendicular to the shoreline along the western bank of the River. (App. 021). It is unknown who originally constructed this jetty. (App. 703). It is believed that it was constructed between 1935 and 1943. (App. 029). In the early 1990s, the Town repaired and expanded the existing jetty, although the summary judgment record does not indicate the nature or extent of such work. (App. 022-023).

The plaintiffs own a private beach, known as "Miramar Beach," which is located adjacent to the eastern bank of the River. (App. 015, 021). Miramar Beach is downdrift of the jetty and it has experienced beach erosion. (App. 022, 062). A report commissioned by the plaintiffs found that the construction of the jetty "changed the dynamics" of the sediment transfer and caused Miramar Beach to erode. (App. 028-029).

Since at least the 1980s, the Town has periodically addressed environmental impacts to the River and Swan Pond through various dredging projects. One such project was conducted in 1996 and resulted in the Town depositing a portion of the materials dredged from the River onto the plaintiffs' beach. (App. 022, 379-380, 593-594, 680). The

Town dredged the mouth of the River most recently in 2010 and 2014 to continue to improve tidal flow, reduce nutrient levels and associated algae blooms and fish kills in the upstream waters, improve navigation for small boats and kayaks, and provide beach nourishment. (App. 593-594, 683-687).

The Town's 2010 and 2014 dredging projects were conducted pursuant to permits which allowed it to transport the dredged sand to West Dennis Beach, a Town-owned beach. (App. 593-595, 683-687). Portions of West Dennis Beach have experienced significant erosion in recent years and periodic beach nourishment has been beneficial. (App. 415-417, 593-595, 683-687). The Town is reusing the materials dredged from the river to bolster a sand dune that nourishes the eroding beach, improves habitat for endangered birds, and provides storm damage protection for the beach's public parking lot. (App. 593-597, 683-687). The dredged materials enhance the sediment-starved beach and protect it against continuous storm damage. Exhibit 593-597, 683-687).

The plaintiffs contacted the Town on multiple occasions voicing concerns related to the buildup of sediment at the mouth of the River and requesting the Town to dredge the area to improve the River's flow. (App. 023-

026). Plaintiffs voiced concerns that the periodic sediment buildup results in erosion to their private beach. (App. 023-026). They also requested that the Town build a second jetty along the eastern side of the river channel. (App. 285-288).

Maintenance Dredging of the River

In 2009 the Town obtained new permits for a long-term "maintenance dredging" project at the mouth of the River.[2] (App. 593-679). This project is publicly-funded. (App. 684-689). The Town obtained the following environmental permits and permissions for the project:

1. The Dennis Conservation Commission granted approval under the State Wetlands Protection Act, G.L. c.131, §40 for the dredging;

2. The Dennis Conservation Commission granted approval under the State Wetlands Protection Act, G.L. c.131, §40 for the nourishment of West Dennis Beach;

3. The Dennis Conservation Commission granted approval under the Town of Dennis Wetlands Bylaw for the dredging;

4. The Dennis Conservation Commission granted approval under the Town of Dennis Wetlands Bylaw for the nourishment of West Dennis Beach;

5. The Mass. Department of Environmental Protection ("DEP") under the State Waterways Program, G.L. c.91, granted approval for the dredging;

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[2] "Maintenance Dredging" is defined in the state wetlands regulations as: "dredging under a license in any previously dredged area which does not extend the originally-dredged depth, width, or length but does not mean improvement dredging or backfilling." 310 CMR 10.23.

6. DEP granted approval under the State Waterways Program, G.L. c.91, for the nourishment of West Dennis Beach;

7. DEP granted approval for the project under its 401 Water Quality Certification Program;

8. DEP granted approval for the project under the Massachusetts Environmental Protection Act ("MEPA");

9. The project was approved by the Massachusetts Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program ("NHESP");

10. The Executive Office of Energy and Environmental Affairs for a Public Benefit Determination approved the project under the provisions of an Act Relative to Licensing Requirements for Certain Tidelands'

11. The U.S. Army Corps Of Engineers granted approval for the project under a Section 404 Programmatic General Permit; and

12. The project was approved under a Federal consistency review by the Office of Coastal Zone Management. (App. 593-689).

Each of the governmental bodies listed above approved the Town's maintenance dredging project under their respective environmental jurisdictions. (App. 595). The permits and permissions listed above were issued based on plans and representations that the dredge materials would be deposited at West Dennis Beach. (App. 593-689). There were no administrative or judicial appeals raised as to any of the permits listed above. (App. 519-522, 595).

The first round of dredging under these permits took place in 2010. (App. 593-595). The dredged materials were

deposited at West Dennis Beach, in accordance with the Town's permits. (App. 593-595). Thereafter, the Town determined that additional maintenance dredging was required. (App. 684-685). The Town was aware of the plaintiffs' interest in the Town's efforts related to the River. (App. 681). Accordingly, there was ongoing communication and a meeting with the plaintiffs and/or their legal counsel. (App. 681). Notwithstanding certain disagreements, the Town elected to proceed with the next round of maintenance dredging. (App. 681).

Plaintiff's Motion for Preliminary Injunction

On September 10, 2014, two business days before the dredging was scheduled to begin, the plaintiffs filed an action in the Barnstable Superior Court, in the case captioned Miramar Park Associates, Inc. v. Town of Dennis, C.A. No. 1472CV00438, along with a request for a Temporary Restraining Order/Preliminary Injunction. (App. 5-12).

After a hearing, on September 15, 2014, the Barnstable Superior Court (Muse, J.) denied the request for injunctive relief, ruling that the plaintiffs failed to comply with the 21-day notice requirement contained in G.L. c. 214, §7A, and further noting that the Town had "substantial defenses," including that the plaintiffs' ability to challenge the project had been waived "by Miramar's failure

to pursue timely administrative appeals of the local and state permits." (App. 090-093).

After the Superior Court's denial of the plaintiffs' motion for preliminary injunction, the Town dredged the mouth of the River in the fall of 2014 and deposited the materials at West Dennis Beach, as required by its permits. (App. 684-685). These materials were used to create a sand dune to nourish the beach and improve wildlife habitat for endangered birds, provide storm protection for a public parking lot, and provide storm protection for the beach from repetitive damage. (App. 593-594).

Environmental Approval of Town's Comprehensive Dredging Plan

The Town has created a 10-year comprehensive plan for publicly-funded dredging and nourishment of the eroding beaches throughout the Town. (App. 560-592, 685). The Town's plan was developed in consultation with state agencies including the Massachusetts Office of Coastal Zone Management, MassDEP, and the Division of Marine Fisheries. (App. 560-592).

Since 2014 there has been additional buildup of sediment at the mouth of the River. (App. 684). The Town has determined that additional dredging is required in order to maintain navigable connections between the River

and Nantucket Sound, increase flow, and to reduce algae blooms and fish kills. (App. 684-685). Dredge materials will again be used at West Dennis Beach to nourish the beach (as required by its permits) to improve water quality at the mouth of the River and provide storm protection and nourishment to West Dennis Beach and its parking lot. (App. 684-685).

The Town submitted its 10-year plan to the Secretary of the Executive Office of Energy and Environmental Affairs ("Secretary") pursuant to the Massachusetts Environmental Policy Act ("MEPA"). (App. 560-591). On October 23, 2015, the Secretary issued a decision which reviewed the Town's 10-year plan and determined that the Town did not need to submit an Environmental Impact Report. (App. 560-591). As part of the MEPA review process, the Secretary obtained comments from relevant state agencies, including DEP, which were supportive of the Town's plan and did not identify issues that warranted additional analysis. App. 560-571). The MEPA decision noted that the 10-year plan will allow the Town to "nourish the highest priority areas and allow for effective use of Town and County resources." (App. 564, 580).

The Secretary's decision also acknowledged receipt of public comments submitted by a representative of the

plaintiffs. (App. 566, 577-578). However, neither the Secretary, nor any of the agencies that submitted comments during the MEPA review, stated that the Town should be required to deposit the dredge materials on Miramar Beach or opined that the Town was in violation of 310 CMR 10.27(4)(c). (App. 560-591). To the contrary, DEP, which oversees compliance with the state wetlands and waterways regulations, noted that the Town is required to deposit the dredged materials on Town-owned beaches pursuant to 310 CMR 9.40(4), which is a waterways regulation promulgated under G.L. c. 91. (App. 581-582). The Secretary also noted that the Town intends to deposit dredged materials at Town-owned beaches that are downdrift from the River as part of the 10-year plan. (App. 566).

Anticipated Additional Dredging

The Town's maintenance dredging project continues to be publicly-funded. (App. 684-688). On May 3, 2016, the Town Meeting voted to raise and appropriate $50,000 for the Harbor Department to dredge the mouth of the River. (App. 684-688). The Town planned to perform the next round of maintenance dredging of The River in November 2016 and to deposit the materials at West Dennis Beach in accordance with its existing permits. (App. 685). The approvals and permits originally issued to the Town in 2009 are still in

effect, except for the U.S. Army Corps of Engineers permit. (App. 685). The dredging planned for 2016 did not take place because of a delay in obtaining an extension of the permit from the U.S. Army Corps of Engineers. (App. 685)

In addition to its plans to re-nourish West Dennis Beach, the Town's 10-year plan demonstrates its intent to nourish several other Town-owned beaches, including beaches that are downdrift from the Swan Pond River Jetty. (App. 560-571, 581-582).

SUMMARY OF THE ARGUMENT

I. The Superior Court Erred In Issuing An Injunction Requiring The Town To Take Actions That Are In Conflict With Applicable State Statutes And Regulations And Which Interferes With The Exercise Of Executive Discretion.

Although the Superior Court's decision is subject to review for abuse of discretion, its discretion is not absolute and an injunction is subject to reversal when the Court exceeds its authority by usurping executive and legislative functions (p. 20-21).

In this case, the Superior Court abused its discretion in granting the plaintiffs' request for injunctive relief because the Court's decision is in direct conflict with applicable statutes and regulations, specifically, 310 CMR 9.40, which requires the Town to use dredge materials to

nourish eroding public beaches (p. 21-27), and G.L. c. 30B, §15, which requires the Town to engage in a competitive disposition process for the sale of tangible supply (p. 27-30). Moreover, the Superior Court's Order also fails to take into account the numerous permits and approvals that would be required for the reuse of dredge materials and the high degree of discretion afforded public officials in allocating limited resources for the protection of the environment as a whole (p. 30-31).

II. The plaintiffs Failed to Establish a Right to Relief Pursuant to G.L. c. 214, §7A

To support an award of injunctive relief pursuant to G.L. c. 214, §7A, the plaintiffs bear the burden of proving both that the Town is causing or about to cause damage to the environment, and that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment (p. 32-34).

A. The Superior Court erred in Finding that the Town Violated 310 CMR 10.27(4)(c)

The Superior Court held that the Town violated 310 CMR 10.27(4)(c) when it completed the jetty project in the 1990's without including a sand bypass system or conducting periodic maintenance dredging to re-nourish the plaintiffs'

private beach. The plaintiffs, however, did not bring this action or move for summary judgment on the basis of the Town's 1990's jetty project. Notwithstanding liberal rules of pleading, the Superior Court erred when it entered judgment for the plaintiffs on this claim, which was raised for the first time in response to the Town's Cross-Motion for Summary Judgment. By allowing the plaintiffs to proceed in this way, the Superior Court deprived the Town of fair notice of the plaintiffs' claims and prejudiced its ability to adequately assert any available defenses (p. 34-36).

The Superior Court erred in its finding that the Regulation at issue requires the Town to provide nourishment for the plaintiffs' private beach in connection with the 1990's jetty project. Rather, the Regulation only requires beach nourishment when the local conservation commission makes certain determinations about the need for beach nourishment and the summary judgment record is devoid of any evidence to suggest that such findings were made in connection with the jetty project that occurred in the 1990's (p. 37-38).

The Superior Court also erred in finding that the Regulation at issue requires the Town to provide beach nourishment for the plaintiff's private beach. Although

the plaintiffs' beach is adjacent to the jetty, the Regulation allows for the exercise of discretion by the Town and the local conservation commission to determine which beaches are nourished, as long as they are adjacent or downdrift from the jetty (p. 38-39).

Even if the Regulation applies, the evidence in the summary judgment record shows that the Town has periodically dredged the mouth of the River, it has provided nourishment to adjacent and downdrift beaches and that it plans to continue doing so. As this is all that the Regulation requires, the Superior Court erred in finding that the Town violated 310 CMR 10.27(4)(c) (p. 39-40).

B. The Superior Court Erred In Finding That The Town Is Causing Or About To Cause Damage To The Environment.

The Superior Court erred in finding that the Town is causing or about to cause damage to the environment. The Superior Court's decision is in error because it interpreted the term "damage to the environment" too narrowly. The Town has several miles of shoreline, including nineteen public beaches and four waterways. Over the years, the Town has expended significant amounts of public resources on projects designed to improve the Town's environmental resources as a whole. The Town's plans for

the prevention of damage to the environment have been approved by numerous federal, state and local agencies and have been found to "nourish the highest priority areas and allow for effective use of Town and County resources." As the Town's extensive actions have resulted in significant benefits to its environmental resources, the Superior Court erred in finding that the Town has caused damage to the environment (p. 40-45).

ARGUMENT

I. The Superior Court Erred In Issuing An Injunction Requiring The Town To Take Actions That Are In Conflict With Applicable State Statutes And Regulations And Which Interferes With The Exercise Of Executive Discretion.

The Superior Court's Order requires the Town to "periodically dredge Swan Pond River to re-nourish Miramar Beach pursuant to 310 Code Mass. Regs. §10.27(4)(c)." (App. 709). As will be described in detail in the follow sections, the Superior Court abused its discretion in granting the plaintiffs' request for injunctive relief because the Order is in direct conflict with applicable statutes and regulations, specifically, 310 CMR 9.40, which requires the Town to use dredge materials to nourish eroding public beaches, and G.L. c. 30B, §15, which requires the Town to engage in a competitive disposition process for the sale of tangible supply. Moreover, the

Superior Court's Order also fails to take into account the numerous permits and approvals that would be required for the reuse of dredge materials and the high degree of discretion afforded public officials in allocating limited resources for the protection of the environment as a whole. Therefore, because the Superior Court's Order conflicts with other applicable laws and interferes with the exercise of discretion by the Town and other permit-granting authorities, the Judgment of the Superior Court should be reversed.

A. Standard of Review of Award of Injunctive Relief

An award of injunctive relief is subject to review for abuse of discretion. Johnson v. Martignetti, 374 Mass. 784, 794 (1978). Notwithstanding the discretion typically afforded the Superior Court in fashioning an award of injunctive relief, that discretion is not absolute. Commonwealth v. Genius, 402 Mass. 711, 714 (1988). "Where a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard separation of powers mandated by art. 30 of the Declaration of Rights of the Massachusetts Constitution." Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 651 (2000). Therefore, an injunction is subject to reversal when the

lower court exceeds its authority by issuing an order that usurps executive and legislative functions. Bradley v. Commissioner of Mental Health, 386 Mass. 363, 365 (1982).

In this matter, as will be described in detail below, the Superior Court abused its discretion in awarding injunctive relief which requires the Town to use dredge materials for the benefit of the plaintiffs' private property because the Court's decision is in direct conflict with applicable statutes and regulations and because the decision interferes with the exercise of executive functions by the Town and other permit-granting authorities.

B. The Superior Court's Order Conflicts with DEP Regulations Concerning the Use of Dredge Material

The Order, which requires the Town to periodically provide nourishment for the plaintiffs' private beach, fails to take into account the numerous other statutes and regulations that apply to beach nourishment and dredging projects. The use of dredge materials and the alteration of coastal beaches are heavily regulated activities that require permits and approvals of numerous federal, state and local bodies. The Town has no control over the issuance of these permits, and if any one is denied, the Town will be unable to comply with the Order.

Most notably, prior to engaging in coastal dredging and/or beach nourishment, the Town is required to obtain a license from DEP in accordance with Chapter 91 of the Massachusetts General Laws. See 310 CMR 9.05(2)(a) and (b). In this regard, the Order stands in direct conflict with the requirements for issuance of such licenses.

Pursuant to 310 CMR 9.31(1)(h), DEP shall not issue a Chapter 91 license "for any project" unless said project "complies with applicable standards governing dredging and disposal of dredge materials, according to the provisions of 310 CMR 9.40." With regard to the re-use of dredge materials from publicly-funded projects, 310 CMR 9.40(4) provides, in pertinent part as follows:

(4) Operational Requirements for Dredged Material Disposal

(a) Where it is determined to be reasonable by the Department, clean dredged material shall be disposed of in a manner that serves the purpose of beach nourishment, in accordance with the following provisions:

1. in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished;

Because any dredging conducted by the Town is publicly funded (App. 684-688), any Chapter 91 license issued would

have to be conditioned on the Town's use of dredge material for publicly-owned beaches. The plaintiffs' beach is privately-owned, therefore, the Town cannot use dredge materials for that beach unless no appropriate public site can be located[3]. There are numerous publicly-owned eroding beaches in the Town (App. 389-448, 560, 594), and these beaches must be given priority over the plaintiffs' privately-owned beach as a matter of law. Therefore, because the Order conflicts with applicable regulations concerning the use of dredge materials, the Order of the Superior Court must be reversed.

The Superior Court glossed over this clear regulatory impediment to the Order simply by speculating that DEP would waive the requirements of 310 CMR 9.40(4). (App. 705). Such a presumption constitutes an abuse of discretion and usurps clearly defined executive functions of DEP and the Town. It is well-settled that courts cannot exercise the functions of the executive branch of government. In Re: McKnight, 406 Mass. 787, 792 (1990). If the Court were to interfere with the exercise of administrative discretion, it would violate the principle of separation of

[3] In fact, 310 CMR 9.40(4) does not require that Chapter 91 licenses be conditioned on use of dredge materials for nourishing privately-owned beaches in any project performed with public funds. Rather, if no appropriate public beach is available, the decision of whether to provide nourishment to private beaches is within the sole discretion of the applicant, subject to any applicable permitting.

powers of government. Charrier v. Charrier, 416 Mass. 105, 110 (1993). Thus, although courts have the authority to direct public officials to carry out a statutory duty, where the means of carrying out that duty are within the discretion of the public official, the court cannot direct the official as to how to exercise that discretion. Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985).

In this regard, DEP has broad discretionary authority in issuing permits for dredging projects and for determining how the dredge materials will be used. Notwithstanding such discretion, however, DEP cannot simply waive the requirements of it regulations. In fact, applicable provisions of the regulations can only be waived in a "rare and unusual circumstance" after a public hearing in which it is found that there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with the regulations. See 310 CMR 9.21 (Variances). As demonstrated by the Town's 10-year plan, there are reasonable means for the Town to comply with 310 CMR 9.40(4) by using dredge materials to restore publicly-owned beaches. Therefore, it is beyond the authority of the Court to simply presume that DEP will waive compliance with its regulations.

As discussed in detail below, the Superior Court found that DEP would waive the requirements of 310 CMR 9.40(4) in favor of a wetlands regulation, 310 CMR 10.27(4)(c), relating to the nourishment of beaches downdrift of jetties. (App. 705). In presuming that the DEP will simply waive the requirements of one regulation in favor of another, the Superior Court essentially nullified 310 CMR 9.40(4)(a). It was unnecessary, however, for the Court to do so. Assuming that 310 CMR 10.27(4)(c) applies to the Town[4], the two regulations can be interpreted so as to give full force and effect to both of them. Both 310 CMR 10.27(4)(c) and 310 CMR 940(4)(a) were promulgated by DEP in furtherance of its mandate to protect the environment. If they both apply in this case, then the standard rules of statutory construction required the motion judge to construe the regulations harmoniously so both can be applied without conflict. Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 382 Mass. 580, 585 (1981)("where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose."); County Comm'rs of

[4]As will be discussed in Section II(A) of this Brief, 310 CMR 10.27(4)(c) does not apply to the Town's dredging projects.

Middlesex County v. Superior Court, 371 Mass. 456, 460 (1976)("Statutes which do not necessarily conflict should be construed to have consistent directives so that both may be given effect.").

In this case, the two regulations are easily reconciled. On the one hand, 310 CMR 10.27(4)(c) requires that the approval of jetty reconstruction projects include a requirement that there be periodic dredging to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediment; and, on the other hand, 310 CMR 9.40(a)(1) requires that, in the case of a publicly-funded dredging project, the dredge material shall be placed on publicly-owned eroding beaches. Thus, in the case of a publicly-funded project, there can be compliance with both of these regulations by including a requirement in any Chapter 91 license that there be periodic dredging to provide beach nourishment for downdrift public beaches.[5]

In this matter, the Town simply cannot comply with the Order without running afoul of DEP's requirements concerning the use of dredge material. There are numerous public beaches in the Town that are in need of nourishment, and the Town's 10-year dredging and beach nourishment plan

[5] Alternatively, as observed by DEP in commenting on the Town's 10-year plan, dredged materials taken from the river could be used to nourish the plaintiffs' private beach if the plaintiffs' project is privately funded. (App. 582).

was approved on the condition that dredge material would be used to restore these beaches, some of which are downdrift of the jetty. (App. 566, 581-582). It is not within the province of the Town to simply ignore these directives for the benefit of private parties, and the Court cannot order the Town to take actions that violate other applicable laws. Therefore, the Judgment of the Superior court should be reversed.

C. The Superior Court's Order Conflicts with Chapter 30B of the General Laws

The Order also conflicts with the Town's obligations under Chapter 30B of the Massachusetts General Laws. Specifically, pursuant to G.L c. 30B, §15, the Town is required to engage in a competitive disposition process for the disposal of any "tangible supply, no longer useful to the governmental body but having resale or salvage value." Without citation to any legal authority, the Superior Court found that material obtained by dredging does not constitute tangible supply within the meaning of Chapter 30B. (App. 706). The term "supplies", however, is broadly defined to include "all property, other than real property, including equipment, materials, printing and insurance and further including services incidental to the delivery,

conveyance and installation of such property." G.L. c. 30B, §2.

Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price and to treat all persons equally. Phipps Products Corp. v. MBTA, 387 Mass. 687, 691-2 (1982). As such, the requirements of the statute are strictly applied, and will override any equitable considerations that might otherwise be afforded in private transactions. Id. Furthermore, any transaction that is undertaken by a government entity in violation of G.L. c. 30B is invalid as a matter of law. G.L. c. 30B, §17(b).

In this matter, the dredge material sought by the plaintiffs clearly constitutes tangible supply within the meaning of Chapter 30B insofar as it has resale value. In May, 2016, the Town appropriated $50,000 to dredge The River. (App. 684-688). It costs the Town approximately $9 to $13 per cubic yard to remove sand from the mouth of The River and to relocate it to West Dennis Beach. (App. 685). This price is substantially lower than what the Town or other parties would pay for sand purchased from a commercial seller that would have to be transported, unloaded and spread. (App. 685).

If the Town were to provide beach nourishment to the plaintiffs' private property, it would be conferring a substantial benefit upon them. Indeed, if the material was of no value, as suggested by the Superior Court, the plaintiffs would not need the Town's dredge material because they could obtain such material themselves. Moreover, the Superior Court's Order does not simply require the Town to provide the plaintiffs with dredge material, it also requires the Town to perform the work required to nourish their beach. This work, which constitutes a service incidental to the delivery, conveyance and installation of materials, falling within the definition of "Supplies" in G.L. c. 30B, §2, also has value on the open market. Requiring the Town to perform such work for the plaintiffs clearly confers a valuable benefit upon them. Therefore, because the requirements of the Order conflict with the requirements of Chapter 30B, the Superior Court abused its discretion and its Judgment should be reversed.

D. The Order Interferes with the Town's Discretion in Allocating Limited Public Resources for the Protection of the Environment

In addition to conflicting with applicable statutes and regulations, the Order usurps the authority of the Town in deciding how to allocate limited public resources.

Balancing the need for environmental protection with available resources and deciding how to allocate such resources involves a high degree of discretion and judgment that a court cannot review. Barnett v. City of Lynn, 433 Mass. 662, 665 (2001).

By issuing an injunction requiring the Town to provide nourishment for the plaintiffs' private beach, the Superior Court substituted its judgment for that of the Town as to how to best allocate its limited resources for the protection of the environment. In this regard, the Order simply goes too far. The Town owns a total of nineteen public beaches and is responsible for maintaining four waterways, including Swan Pond River. (App. 371, 398). In consultation with federal and state agencies, the Town has developed a 10-year comprehensive plan to address the issue of beach erosion throughout the Town. (App. 560-571). As recognized by the Secretary of the Executive Office of Energy and Environmental Affairs, the Town's plan allows it to "nourish the highest priority areas and allow for effective use of Town and County resources." (App. 564, 580).

Notwithstanding its recognition of the "significant public interest in nourishing eroding Town-owned beaches" (App. 704), the Superior Court has usurped the Town's

authority and ordered it to re-allocate its resources for the benefit of the plaintiffs' private beach. As such a decision exceeds the authority of the Court and improperly interferes with the executive functions of the Town, the Order constitutes an abuse of discretion. Therefore, the Judgment should be reversed.

II. The Plaintiffs Failed to Establish a Right to Relief Pursuant to G.L. c. 214, §7A

In addition to abusing its discretion with respect to the issuance of an injunction in this matter, the Superior Court committed an error of law in finding that the plaintiffs met the criteria for injunctive relief as required by G.L. c. 214, §7A. To support an award of injunctive relief pursuant to G.L. c. 214, §7A, the plaintiffs bear the burden of proving both that the Town is causing or about to cause damage to the environment, and that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment. G.L. c. 214, §7A; Town of Boxford v. Mass. Highway Department, 458 Mass. 596, 604 (2010). In this matter, as will be described in detail in the following sections, the Superior Court erred in finding that these elements of the statute have been met.

A. The Superior Court Erred In Finding That The Town Violated 310 CMR 10.27(4)(c).

As the statutory predicate for their claim for injunctive relief, the plaintiffs alleged in their complaint and their motion for summary judgment that the Town violated 310 CMR 10.27(4)(c) (the "Regulation"), because the Town was using materials dredged from the mouth of The River to provide restoration for Town-owned West Dennis Beach, instead of for providing nourishment for the plaintiffs' private beach. (App. 14-15, 32-34, 97-98, 111-112).

The Regulation provides, in pertinent part, as follows:

> *WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(3) THROUGH (7) SHALL APPLY:*
>
> *(3) Any project on a coastal beach … shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift beach.*
>
> *(4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:*
>
> > *(a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume…*
> >
> > *(b) Immediately after construction any groin shall be filled to entrapment capacity in height*

and length with sediment of grain size compatible with that of the adjacent beach.

(c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

The Superior Court correctly held that the Regulation is a performance standard for jetty construction projects and that it was not triggered by the maintenance dredging projects that the plaintiffs sought to enjoin. (App. 704-705). This finding should have resulted in a judgment in favor of the Town as a matter of law. The Superior Court, however, went further and found that the Regulation was triggered when the Town completed a jetty restoration project more than twenty years ago in the 1990's. (App. 705). This finding was in error, however, because the claim was not seasonably raised by the plaintiffs and because, even if the Regulation was triggered by the 1990's jetty project, the Regulation does not require the Town to provide nourishment for the plaintiffs' private beach.

1. The Superior Court Erred in Basing Liability on a Claim not Raised in the Complaint

The Superior Court held that the Town violated 310 CMR 10.27(4)(c) when it completed a jetty restoration project in the 1990's without including a sand bypass system or

conducting periodic maintenance dredging to re-nourish the plaintiffs' private beach. (App. 705). The plaintiffs, however, did not bring this action or move for summary judgment on the basis of the Town's 1990's jetty project. Rather, the focus of the plaintiffs' complaint and Motion for Summary Judgment was on the Town's 2014 dredging project. (App. 14-15, 32-34, 97-98, 111-112). Indeed, the plaintiffs only raised the 1990's jetty issue for the first time in their Opposition to the Town's Cross-Motion for Summary Judgment, and even then only by passing reference. (App. 148-163).

Notwithstanding liberal rules of pleading, a plaintiff cannot raise a new claim for the first time in response to the motion for summary judgment. Asociación de Suscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Juarbe-Jiménez, 659 F.3d 42, 53 (1st Cir. 2011) (citing, Gilmour v. Gates, 382 F.3d 1312, 1315 (11th Cir. 2004)). Rather, Mass.R.Civ.P. 8(a)(1) requires that the complaint contain a "short and plain statement of the claim", sufficient to afford the defendant with fair notice of the basis and nature of the action against it. Berish v. Bornstein, 437 Mass. 252, 269 (2002). Where the plaintiff fails to adequately plead a claim, the court is not authorized to recast the complaint in a form that

corresponds to the judge's view of what the plaintiff intended but failed to adequately set forth. Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985).

In this matter, nothing in the plaintiffs' complaint, or its original Motion for Summary Judgment, gave the Town fair notice of its intent to claim that the Town's 1990's jetty project triggered the requirements of 310 CMR 10.27(4)(c). Indeed, there are no facts in the record concerning the circumstances of that project, the permitting it went through or what regulatory conditions it was subject to. Because this new legal theory was introduced into the case for the first time in response to the Town's Cross-Motion for Summary Judgment, the Town had no opportunity to adequately defend against it, and was prejudiced by the entry of judgment on that basis.

The only claim seasonably raised by the plaintiffs was that the Town was required to comply with the Regulation in connection with its 2014 dredging project, and that the Town had violated this Regulation by choosing not to deposit the dredge materials on the plaintiffs' private beach. As to this claim, the Superior Court correctly held that the Regulation does not apply. (App. 705). This finding should have resulted in a judgment in favor of the Town. Instead, the Superior Court allowed the plaintiffs

to recast their complaint and found in their favor on the basis of a claim not adequately pled or raised in a timely manner. This was a clear error of law that requires reversal of the Judgment.

2. The Regulation at Issue Does not Require the Town to Use Dredge Materials to Nourish the Plaintiffs' Private Beach

Assuming, *arguendo*, that the Town can be held liable on the basis of the 1990's jetty project, the Superior Court erred in holding that the Town failed to comply with the Regulation. As described above, when applicable, the Regulation requires that an Order of Conditions for a jetty construction project must include a requirement that the area affected by the jetty "shall be periodically re-dredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments" (emphasis supplied). Such a condition, however, only needs to be included when the local conservation commission determines that the affected beach is significant to storm damage prevention, flood control or the protection of wildlife prevention, and when the project has an adverse effect by increasing erosion on such adjacent or downdrift beach. 310 CMR 10.27.

In this matter, the summary judgment record is devoid of any evidence to suggest that the 1990's jetty project

triggered the requirements of the Regulation. The project is not described with any specificity and the record is devoid of any evidence to suggest that the project had an adverse effect on the plaintiffs' or any other beach[6], as required by 310 CMR 10.27(3). In the absence of such evidence, the Superior Court erred in finding that the Town violated the Regulation. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711 (1991)("A complete failure of proof concerning an essential element of the non-moving party's case renders all other facts immaterial" and requires summary judgment in favor of the moving party"); NG Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002) (summary judgment is "available if the party with the burden of proof at trial . . . fails to present in the summary judgment record, taking everything it says as true and drawing all reasonable inferences in its favor, sufficient facts to warrant a finding in its favor").

Moreover, even if it applied to that project, the Regulation does not require the Town to provide the plaintiffs with dredge materials for beach nourishment.

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[6] If the Town had adequate notice of this claim, it could have submitted evidence to show that that the project conducted in the 1990's merely stabilized the existing jetty and extended it landward along the western bank of the Swan Pond River. Such evidence would have demonstrated that the project did not have any adverse effects beyond the effects caused by the original construction of the jetty many decades earlier.

When applicable, the Regulation requires nourishment of "downdrift or adjacent beaches" 310 CMR 20.27(4)(c)(emphasis supplied). By use of the word "or" in the Regulation, it is clear that DEP intended to provide discretion to the applicant as to which beaches would be re-nourished in connection with jetty construction projects, provided that such beaches are downdrift or adjacent to the jetty. See Siebe, Inc. v. Louis M. Gerson Co., 74 Mass. App. Ct. 544, 551 n. 16 (2009) ("Generally, the conjunctive 'and' should not be considered as the equivalent of the disjunctive 'or'"). Had DEP intended for beaches adjacent to jetties to be nourished in such situations, it could had drafted the regulation to require this. See Dartt v. Browning-Ferris Indus., 427 Mass. 1, 8 (1998) ("we will not add to a statute a word that the Legislature had the option to, but chose not to, include"). Instead, the Regulation was drafted to allow for discretion on the part of the Town in managing its resources and the part of the conservation commission in issuing permits to maximize environmental protection.

Notwithstanding the fact that the Regulation does not apply to the Town, from the evidence in the summary judgment record, it is clear that the Town has been in compliance with the Regulation. The record shows that the

Town has periodically dredged of the mouth of the River over a period of several years. (App. 680). The Town has also provided beach nourishment to Miramar Beach (an adjacent beach) (App. 026), and the Town's 10-year plan demonstrates its intent to provide additional nourishment for publicly-owned beaches downdrift of the jetty. (App. 559-571, 683-688). As noted by the Secretary of Energy and Environmental Affairs in approving the Town's 10-year plan, the Town is planning to exercise its discretion to "nourish the highest priority areas and allow for effective use of Town and County resources." (App. 564).

Given the level of discretion afforded the Town and permit-granting authorities, the summary judgment record simply does not support a finding that the Town violated the Regulation. To the contrary, the record shows that the Town has periodically dredged the mouth of the River, it has provided nourishment to adjacent and downdrift beaches and it plans to continue doing so. This is all the Regulation requires. Therefore, because there was no violation of the Regulation, the Judgment of the Superior Court should be reversed.

B. The Superior Court Erred In Finding That The Town Is Causing Or About To Cause Damage To The Environment.

General Laws General Laws c. 214, §7A allows ten persons domiciled in Massachusetts to bring a civil action to restrain activity where "damage to the environment" is occurring or about to occur. The statute defines "damage to the environment" as: "any destruction, damage or impairment, actual or probable, to any of the natural resources of the Commonwealth . . ." G.L. c. 214, §7A. The statute also states that: "Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources." Id.

In this case, the Superior Court concluded that "damage to the environment, the erosion of Miramar Beach, is occurring or is about to occur from the Town's failure to periodically re-nourish the beach as required by 310 Code Mass. Regs. § 10.27(4)(c)." (App. 709). As discussed below, the Superior Court interprets "damage to the environment," as that term is used in G.L. c. 214, §7A, too narrowly.

The Town has several miles of shoreline, including 19 public beaches and a number of privately owned beaches. (App. 398). Many of these beaches suffer from erosion and

other impediments that require the expenditure of public funds to maintain. (App. 398-450, 594). The plaintiffs' private beach is but one of these beaches. While the plaintiffs' beach may be suffering from erosion, the Superior Court's decision overlooks the fact that the Town has expended substantial time and effort to create a plan, in consultation with, and with approval from, the relevant environmental regulators to address beach erosion in a manner that benefits and improves the environment in the Town as a whole. (App. 559-571).

Specifically, the Town has created a 10-year comprehensive plan for publicly-funded dredging and nourishment of the Town's eroding beaches, including beaches downdrift from the Swan Pond river jetty. (App. 359-371). The Town's plan was developed in consultation with state agencies including the Massachusetts Office of Coastal Zone Management, DEP, and the Division of Marine Fisheries. (App. 359-371). As part of the MEPA review process, the Secretary of Environmental Affairs obtained comments from relevant state agencies, including DEP, which were supportive of the Town's plan and did not identify issues that warranted additional analysis. (App. 359-371, 380-386). On October 23, 2015, the Secretary issued a decision finding that the Town's 10-year plan will allow

the Town to "nourish the highest priority areas and allow for effective use of Town and County resources." (App. 571).

In conjunction with the 10-year plan, the Town's environmental permits allow it to use dredge materials to provide nourishment for West Dennis Beach, a Town-owned beach, in need of restoration. (App. 593-595). As found by the Superior Court, the Town is depositing dredged materials on West Dennis Beach for the purposes of "beach nourishment, storm protection, protection of wildlife habitat, and bolstering the sand dune that protects a public parking lot." (App. 699). The dredged materials enhance the sediment-starved beach and protect it against continuous storm damage. (App. 593-595).

In addition to providing nourishment for West Dennis Beach, additional dredging of the mouth of the River maintains navigable connections between the river and Nantucket Sound, increases flow, and reduces algae blooms and fish kills. (App. 684-688). The Town's dredging of the River has been thoroughly vetted and approved by local, state, and federal regulators including the Town of Dennis Conservation Commission, DEP, Massachusetts Division of Fisheries and Wildlife, Executive Office of Energy and Environmental Affairs, U.S. Army Corps of Engineers, and

the Office of Coastal Zone Management. (App. 594-595. This extensive level of permitting clearly demonstrates that the Town is not causing or about to cause damage to the environment. See, e.g. Collora v. Newton Conservation Commission, 1995 Mass. Super. Ct. 1995 WL 1146116 (1995) (holding that environmental damage was not about to occur pursuant to G.L. c. 214, §7A where the development of a subdivision was subject to an order of conditions issued by conservation commission).

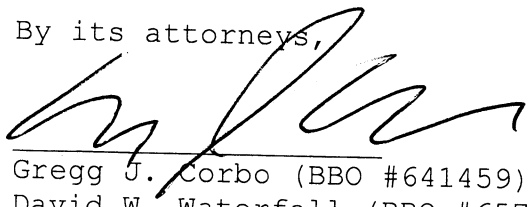
Rather than causing damage to the environment, the record shows that the Town is preventing such damage through its numerous projects to restore and enhance its natural environment. As recognized by the Superior Court, "there is a significant public interest in nourishing eroding Town-owned beaches, as well as the Town's authority and discretion in allocating its environmental protection efforts and financial resources." (App. 704). The fact that the Town has chosen to allocate these limited resources for the benefit of publicly-owned beaches, does not mean that it is causing or about to cause damage to the environment. Therefore, because the Superior Court erred in holding that the plaintiffs' met the criteria for injunctive relief pursuant to G.L. c. 214, §7A, the Judgment should be reversed.

CONCLUSION

For the foregoing reasons, the Judgment of the Superior Court should be reversed.

DEFENDANT-APPELLANT
TOWN OF DENNIS,

By its attorneys,



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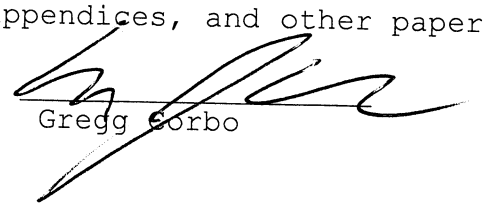
CERTIFICATE OF COMPLIANCE

This brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: M.R.A.P. 16(a)(6) (pertinent finding or memorandum of decision); M.R.A.P. 16(e) (references to the record); M.R.A.P. 16(f) (reproduction of statutes, rules, regulations); M.R.A.P. 16(h) (length of brief); and M.R.A.P. 20 (form of briefs, appendices, and other papers).

Dated: December 18, 2017



Gregg Corbo

CERTIFICATE OF SERVICE

I, Gregg J. Corbo, certify that on the date below I served a true copy of the Brief of the Defendant-Appellant Town of Dennis by first-class mail, postage prepaid, on the counsel of record below:

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Sandwich, MA 02563

12-21-17
Date

Gregg Corbo

ADDENDUM

TABLE OF CONTENTS

Massachusetts General Laws
Chapter 30B, Section 2: Definitions

Section 2. As used in this chapter the following words shall, unless the context requires otherwise, have the following meanings:?

"Architect and engineer", (i) a person performing professional services of an architectural or engineering nature, as defined by law, which are required to be performed or approved by a person licensed, registered or certified to provide such services as described herein; (ii) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, investigations, inspections, tests, evaluations, consultations, program management, value engineering, construction, alteration, or repair of real property; and (iii) such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions and individuals in their employ may logically or justifiably perform, including studies, investigations, surveying and mapping, soil tests, construction phase services, drawing reviews, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, soils engineering, cost estimates or programs; preparation of drawings, plans, or specifications, supervision or administration of a construction contract, construction management or scheduling, preparation of operation and maintenance manuals and other related services.

"Bid", a written offer to provide a supply or service at a stated price submitted in response to an invitation for bids.

"Chief procurement officer", the purchasing agent appointed pursuant to section one hundred and three of chapter forty-one, or as to any city or town which has not accepted said section, an individual duly appointed in a city having a city manager, by the city manager, in a town having a town manager, by the town manager, in any other town, by the selectmen, or, in any city or town otherwise providing by charter or local by-law for the appointment of a chief procurement officer, in accordance with such charter or local by-law, to procure all supplies and services for the city or town and every governmental body thereof; an individual duly appointed in a district by the prudential committee, if any, otherwise the commissioners to procure all supplies and services for the district; an individual duly appointed in a regional school district by the regional school district committee to procure all supplies and services for the regional school district; an individual duly appointed in a county having a county executive, by the county executive, or in any other county, by the commission, to procure all supplies and services for the county and every governmental body thereof; or an individual duly appointed by the governing board of an authority or other governmental body to procure supplies and services for the authority or governmental body.

"Contract", all types of agreement for the procurement or disposal of supplies or services, regardless of what the parties may call the agreement.

"Contractor", a person having a contract with the governmental body.

"Cooperative purchasing", procurement conducted by, or on behalf of, more than 1 public procurement unit or by a public procurement unit with an external procurement activity.

"Electronic bidding", the electronic solicitation and receipt of offers to contract for supplies and services; provided, however, that offers may be accepted and contracts may be entered into by use of electronic bidding.

"Employment agreement", any agreement between a governmental body and an individual pursuant to which (1) the governmental body withholds or is required to withhold taxes on the individual's wages

pursuant to the Internal Revenue Code or chapter sixty-two B; or (2) the governmental body and the individual stand under common law rules in the legal relationship of employer and employee.

"External procurement activity", (a) a public agency not located in the commonwealth which would qualify as a public procurement unit; (b) buying by the United States government.

"Governmental body", a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county.

"Grant agreement", an agreement between a governmental body and an individual or nonprofit entity the purpose of which is to carry out a public purpose of support or stimulation instead of procuring supplies or services for the benefit or use of the governmental body.

"Invitation for bids", the documents utilized for the soliciting of bids, including documents attached or incorporated by reference.

"Labor relations representative", a person designated to represent a public employer and act in its interest in dealing with public employees pursuant to chapter one hundred and fifty E.

"Local public procurement unit", a political subdivision or unit thereof which expends public funds for the procurement of supplies.

"Majority vote", as to any action by or on behalf of a county or instrumentality of the county, a simple majority of the commission; a city, town, or district, a majority vote as defined in section one of chapter forty-four; a regional school district, an affirmative vote by two-thirds of the members of the regional district school committee; or a housing authority, a simple majority of its members.

"Minor informalities", minor deviations, insignificant mistakes, and matters of form rather than substance of the bid, proposal, or contract document which can be waived or corrected without prejudice to other offerors, potential offerors, or the governmental body.

"Person", any natural person, business, partnership, corporation, union, committee, club, or other organization, entity or group of individuals.

"Procurement", buying, purchasing, renting, leasing, or otherwise acquiring a supply or service, and all functions that pertain to the obtaining of a supply or service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Procurement officer", an individual duly authorized pursuant to law, charter, or local by-law to procure a supply or service for a governmental body or to dispose of a supply, including an individual duly delegated to take any action in connection with a procurement, and further including any member of a board, committee, commission, or other body who participates in a procurement.

"Proposal", a written offer to provide a supply or service at a stated price submitted in response to a request for proposals.

"Public procurement unit", a local public procurement unit or a state public procurement unit.

"Purchase description", the words used in a solicitation to describe the supplies or services to be purchased, including specifications attached to or incorporated by reference into the solicitation.

"Related professionals", professionals engaged in professional services, including land surveying, landscape architecture, environmental science, planning and licensed site professionals, which are required to be performed or approved by a person licensed, registered or certified to provide such services as described herein, including professional services performed by contract that are associated with research, planning, development, design, investigations, inspections, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, value engineering,

construction, alteration or repair of real property and such other professional services or incidental services which members of the related professions and individuals in their employ may logically or justifiably perform, including master plans, studies, surveys, soil tests, cost estimates or program, preparation of drawings, plans or specifications, supervision or administration of a construction contract, construction management or scheduling, conceptual designs, plans and specifications, construction phase services, soils engineering, drawing reviews, cost estimating, preparation of operation and maintenance manuals and other related services; provided, however, that nothing herein shall be construed to constitute regulation or oversight of any designated firms or identified professional services.

"Request for proposals", the documents utilized for soliciting proposals, including documents attached or incorporated by reference.

"Reverse auction", an internet-based process used to buy supplies and services whereby the sellers of the supplies or services being auctioned anonymously bid against each other until time expires and until the governmental body determines from which sellers it will buy based on the pricing obtained during the process.

"Responsible bidder or offeror", a person who has the capability to perform fully the contract requirements, and the integrity and reliability which assures good faith performance.

"Responsive bidder or offeror", a person who has submitted a bid or proposal which conforms in all respects to the invitation for bids or request for proposals.

"Services", the furnishing of labor, time, or effort by a contractor, not involving the furnishing of a specific end product other than reports. This term shall not include employment agreements, collective bargaining agreements, or grant agreements.

"Sound business practices", ensuring the receipt of favorable prices by periodically soliciting price lists or quotes.

"State public procurement unit", the offices of the chief procurement officers and any other purchasing agency of the commonwealth or any other state.

"Supplies", all property, other than real property, including equipment, materials, printing, and insurance and further including services incidental to the delivery, conveyance and installation of such property.

Massachusetts General Laws
Chapter 30B, Section 15: Tangible supply; disposition

Section 15. (a) A governmental body shall dispose of a tangible supply, no longer useful to the governmental body but having resale or salvage value, in accordance with this section. This section does not apply to the disposal of real property.

(b) The governmental body shall offer such supply through competitive sealed bids, public auction, or established markets.

(c) Notice of sale by bid or auction shall conform with the procedures set forth in paragraph (c) of section five. The notice shall indicate the supply offered for sale, designate the location and method for inspection of such supply, state the terms and conditions of sale including the place, date and time for the bid opening or auction, and state that the governmental body retains the right to reject any and all bids.

(d) If the governmental body rejects the bid of the highest responsive bidder, the governmental body may:

(1) negotiate a sale of such supply so long as the negotiated sale price is higher than the bid price; or

(2) resolicit bids.

(e) A procurement officer may trade-in a supply listed for trade-in in the invitation for bids or request for proposals.

(f) For a supply with an estimated net value of less than $10,000, the procurement officer shall dispose of such supply using written procedures approved by the governmental body.

(g) Notwithstanding any other requirement of this section, a governmental body may by majority vote, unless otherwise prohibited by law, dispose of a tangible supply no longer useful to the governmental body but having resale or salvage value, at less than the fair market value to a charitable organization which has received a tax exemption from the United States by reason of its charitable nature.

Massachusetts General Laws

Chapter 214, Section 7A: Damage to the environment; temporary restraining order as additional remedy; definitions; requisites; procedure

Section 7A. As used in this section, "damage to the environment" shall mean any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth, whether caused by the defendant alone or by the defendant and others acting jointly or severally. Damage to the environment shall include, but not be limited to, air pollution, water pollution, improper sewage disposal, pesticide pollution, excessive noise, improper operation of dumping grounds, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic districts or sites. Damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources.

As used in this section "person" shall mean any individual, association, partnership, corporation, company, business organization, trust, estate, the commonwealth or any political subdivision thereof, any administrative agency, public or quasi-public corporation or body, or any other legal entity or its legal representatives, agents or assigns.

The superior court for the county in which damage to the environment is occurring or is about to occur may, upon a civil action in which equitable or declaratory relief is sought in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, or upon such an action by any political subdivision of the commonwealth, determine whether such damage is occurring or is about to occur and may, before the final determination of the action, restrain the person causing or about to cause such damage; provided, however, that the damage caused or about to be caused by such person constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment.

No such action shall be taken unless the plaintiffs at least twenty-one days prior to the commencement of such action direct a written notice of such violation or imminent violation by certified mail, to the agency responsible for enforcing said statute, ordinance, by-law or regulation, to the attorney general, and to the person violating or about to violate the same; provided, however, that if the plaintiffs can show that irreparable damage will result unless immediate action is taken the court may waive the foregoing requirement of notice and issue a temporary restraining order forthwith.

It shall be a defense to any action taken pursuant to this section that the defendant is subject to, and in compliance in good faith with, a judicially enforceable administrative pollution abatement schedule or implementation plan the purpose of which is alleviation of damage to the environment complained of, unless the plaintiffs demonstrate that a danger to the public health and safety justifies the court in retaining jurisdiction.

Any action brought pursuant to the authorization contained in this section shall be advanced for speedy trial and shall not be compromised without prior approval of the court.

If there is a finding by the court in favor of the plaintiffs it may assess their costs, including reasonable fees of expert witnesses but not attorney's fees; provided, however, that no such finding shall include damages.

The court may require the plaintiffs to post a surety or cash bond in a sum of not less than five hundred nor more than five thousand dollars to secure the payment of any costs which may be assessed against the plaintiffs in the event that they do not prevail.

Nothing contained in this section shall be construed so as to impair, derogate or diminish any common law or statutory right or remedy which may be available to any person, but the cause of action herein authorized shall be in addition to any such right or remedy.

310 CMR 9.05(2) (Activities Subject to Jurisdiction)

...

(2) Activities Requiring a Permit Application. Except as provided in 310 CMR 9.05(3), an application for a permit or permit amendment shall be submitted to the Department for the following activities unless the applicant includes such activities in a license application:

(a) any beach nourishment;
(b) any dredging;
(c) any disposal involving the subaqueous placement of unconsolidated material below the low water mark;
(d) any burning of rubbish or other material upon the water, in accordance with M.G.L. c. 91, § 52;
(e) any lowering of the water level of a Great Pond, except a body of water used for agriculture, manufacturing, mercantile, irrigation, insect control purposes, or for flowing cranberry bogs, or for public water supply, in accordance with M.G.L. c. 91, § 19A;
(f) any structure and associated use with the potential to impair the public's rights in tidelands which is intended to remain in place on a temporary basis not to exceed six months, provided said structure and use otherwise meet the applicable substantive standards found at 310 CMR 9.31 through 9.60; and
(g) any structure and associated use with the potential to impair the public's rights in tidelands for the purpose of conducting a Test Project for Innovative Technology, provided

310 CMR 9.21 (Variances)

(1) Required Findings. The Commissioner may waive the application of any other section of 310 CMR 9.00 by making a written finding following a public hearing that:

(a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with 310 CMR 9.00;

(b) the project includes mitigation measures to minimize interference with the public interests in waterways and that the project incorporates measures designed to compensate the public for any remaining detriment to such interests; and

(c) the variance is necessary:
1. to accommodate an overriding municipal, regional, state or federal interest; or
2. to avoid such restriction on the use of private property as to constitute an unconstitutional taking without compensation; or
3. to avoid substantial hardship for the continuation of any use or structure existing as of October 4, 1990, and for which no substantial change in use or substantial structural alteration has occurred since that date.

(2) Procedure

(a) A request for a variance shall be filed by the applicant prior to publication of the notice of public hearing pursuant to 310 CMR 9.13(1). The request shall be in writing and shall include, at a minimum, the following information:
1. an identification of the regulation(s) from which the variance is sought;
2. a description of alternative designs, locations, or construction methods which would achieve the purpose of the project without the need for the variance;
3. an explanation of why each of the alternatives is unreasonable;
4. an analysis of any detriments to interests of the public in waterways due to the proposed project and an explanation of how the detriments have been minimized;
5. a description of the measures that will be provided to compensate for any remaining detriment to public interests in waterways; and
6. a description and supporting documentation of the overriding public interest served by the project, if applicable; or
7. documentation that the project is a continuation of a use or structure existing as of October 4, 1990; that there has not been a substantial change in use or substantial structural alteration since that date; and that application of 310 CMR 9.00 would cause substantial hardship to the applicant, if applicable; or
8. a legal analysis, with supporting documentation, explaining why application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking without compensation, if applicable.

(b) Notice of the variance request shall be published in accordance with 310 CMR 9.13(1) and shall explicitly indicate that a variance is being requested. The Department shall hold a public hearing in accordance with 310 CMR 9.13(3) upon which the Commissioner's findings shall be based. Upon issuance of a variance an adjudicatory hearing is available in accordance with 310 CMR 9.17.

(c) For projects for which an EIR will be prepared in accordance with M.G.L. c. 30, §§ 61 through 62H, the information required pursuant to the provisions of 310 CMR 9.21(2)(a)1. through 7., should be included in the EIR if the need for a variance is reasonably forseeable. If the variance issue was addressed in the final EIR, the Commissioner shall presume that the description of alternatives contained therein satisfies the requirements of 310 CMR 9.21(2)(a)2. Notwithstanding this

presumption, the Commissioner may require any modification of the project reasonably within the scope of an alternative within the final EIR.

(3) Commentary. The variance process is intended to apply in the rare and unusual circumstance where a proposed project satisfies a public interest which overrides the public interest in waterways but cannot be implemented in a manner which is fully consistent with the provisions of 310 CMR 9.00; where application of 310 CMR 9.00 would so restrict the use of private property as to constitute an unconstitutional taking of property; or where application of 310 CMR 9.00 would cause substantial hardship for the continuation of a use or structure existing as of October 4, 1990. The variance process is designed to ensure that a full investigation is made to determine whether the proposed project serves an overriding public interest which outweighs harm to the public resulting from lack of adherence to 310 CMR 9.21 and whether all measures are taken which ensure that detriments to the public interests in waterways are minimized.

310 CMR 9.40(4) (Standards for Dredging and Dredged Material Disposal)

Any project that includes dredging or dredged material disposal shall comply with the following requirements:

(1) Limitations on Dredging and Disposal Activity

(a) The project shall not include any dredging of channels, mooring basins, or turnaround basins to a mean low water depth greater than 20 feet, unless said project:

1. is located within a Designated Port Area; or

2. serves a commercial navigation purpose of state, regional, or federal significance, and cannot reasonably be located in a Designated Port Area.

(b) If the project is located in an ACEC, the project shall not include any of the following activities:

1. improvement dredging, unless the dredging is: for the sole purpose of fisheries or wildlife enhancement; part of an Ecological Restoration Project; or conducted by a public entity for the sole purpose of the maintenance or restoration of historic, safe navigation channels or turnaround basins of a minimum length, width and depth consistent with a Resource Management Plan adopted by the municipality(ies) and approved by the Secretary.

2. dredged material disposal, except for the sole purpose of beach nourishment, dune construction, reconstruction or stabilization with proper vegetative cover, the enhancement of fishery or wildlife resources, or unless the dredged material disposal is
part of an Ecological Restoration Project in accordance with 314 CMR 9.07(1)(c) and 310 CMR 10.11(6)(b) and 310 CMR 40.000: Massachusetts Contingency Plan, if applicable, provided that any fill or dredged material used in an Ecological Restoration Project may not contain a chemical above the RCS-1 concentration, as defined in
310 CMR 40.000: Massachusetts Contingency Plan.

(2) Resource Protection Requirements.

(a) The design and timing of dredging and dredged material disposal activity shall be such as to avoid interference with anadromous/catadromous fish runs. At a minimum, no such activity shall occur in such areas between March 15th and June 15 th of any year, except upon a determination by the Division of Marine Fisheries, pursuant to M.G.L. c. 130, § 19, that such an activity will not obstruct or hinder the passage of fish.

(b) The design and timing of dredging and dredged material disposal activity shall be such as to minimize adverse impacts on shellfish beds, fishery resource areas, and submerged aquatic vegetation. The Department may consult with the Department of Fish and Game or the natural resource officer of the municipality regarding the assessment of such impacts.

(3) Operational Requirements for Dredging.

(a) The extent of dredging shall not exceed that reasonably necessary to accommodate the navigational requirements of the project and provide adequate water circulation.

(b) The shoreward extent of dredging shall be a sufficient distance from the edge of adjacent marshes to avoid slumping. In general, for improvement dredging projects the edge of the

dredging footprint, including any side cuts, should be at least 25 feet from any marsh boundary. In areas where significant wake or wash will be generated by vessel traffic, increased setbacks may be incorporated based on appropriate design calculations.

(c) In general, no basin, canal, or channel shall be dredged deeper than the main channel to which it is connected.

(d) To the maximum reasonable extent, basins shall have wide openings and short entrance channels to promote tidal exchange within the basin.

(e) In general, hydraulic dredging shall be favored over mechanical methods, except when open water disposal of fine grained material is proposed.

(4) Operational Requirements for Dredged Material Disposal.

(a) Where determined to be reasonable by the Department, clean dredged material shall be disposed of in a manner that serves the purpose of beach nourishment, in accordance with the following provisions:

1. in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished;

2. in the case of a privately-funded dredging project, such material may be placed on any eroding beach.

(b) In the event ocean disposal of dredged material is determined to be appropriate by the Department, the licensee or permittee shall:

1. publish in the Notice to Mariners the date, time, and proposed route of all ocean disposal activities and the coordinates of the ocean disposal site, as deemed appropriate by the U.S. Coast Guard;

2. ensure that transport vessels are not loaded beyond capacity; are equipped with sudden, high volume release mechanisms; and are at a complete stop when the material is released; and

3. ensure that disposal occurs within the boundaries of an approved or otherwise formally designated ocean disposal site; and that the discharge location is marked during disposal operations by a buoy equipped with a flashing light and radar reflectors which allow it to be located under variable sea/weather conditions.

(5) Supervision of Dredging and Disposal Activity.

(a) The licensee or permittee shall inform the Department in writing at least three days before commencing any authorized dredging or dredged material disposal.

(b) The licensee or permittee shall provide, at his or her expense, a dredging inspector approved by the Department who shall accompany the dredged material while in transit and during discharges, either upon the scows containing the dredged material or upon the boat towing them, for the following activities:

1. any offshore disposal;

2. any onshore disposal of dredged material greater than 10,000 cubic yards; or

3. the disposal of materials defined by the Department as potentially degrading or hazardous.

(c) The name, address, and qualifications of the dredging inspector shall be submitted to the Department as part of the license or permit application for approval.

(d) Within 30 days after the completion of the dredging, a report shall be submitted to the Department certified by the dredging inspector, including daily logs of the dredging operation indicating volume of dredged material, point of origin, point of destination, and other appropriate information.

310 CMR 10.23 (Additional Definitions for 310 CMR 10.21 through 10.37)

The definitions contained in 310 CMR 10.23 apply to and are valid for 310 CMR 10.21 through 10.37. The following definitions are for terms used throughout 310 CMR 10.21 through 10.37. Other terms that are used only in specific sections of 310 CMR 10.21 through 10.37 are defined in those sections.

...

Maintenance Dredging means dredging under a license in any previously dredged area which does not extend the originally-dredged depth, width, or length but does not mean improvement dredging or backfilling.

310 CMR 10.27 (Coastal Beaches)

(1) Preamble. Coastal beaches, which are defined to include tidal flats, are significant to storm damage prevention, flood control and the protection of wildlife habitat. In addition, tidal flats are likely to be significant to the protection of marine fisheries and where there are shellfish, to land containing shellfish. Coastal beaches dissipate wave energy by their gentle slope, their permeability and their granular nature, which permit changes in beach form in response to changes in wave conditions. Coastal beaches serve as a sediment source for dunes and subtidal areas. Steep storm waves cause beach sediment to move offshore, resulting in a gentler beach slope and greater energy dissipation. Less steep waves cause an onshore return of beach sediment, where it will be available to provide protection against future storm waves. A coastal beach at any point serves as a sediment source for coastal areas downdrift from that point. The oblique approach of waves moves beach sediment alongshore in the general direction of wave action. Thus, the coastal beach is a body of sediment which is moving along the shore.
2 For regulations concerning land containing shellfish see 310 CMR 10.34. Coastal beaches serve the purposes of storm damage prevention and flood control by dissipating wave energy, by reducing the height of storm waves, and by providing sediment to supply other coastal features, including coastal dunes, land under the ocean and other coastal beaches. Interruptions of these natural processes by human-made structures reduce the ability of the coastal beach to perform these functions. A number of birds also nest in the coastal berm, between the toe of a dune and the high tide line. In addition, isolated coastal beaches on small islands are important as haul out areas for harbor seals. Tidal flats are likely to be significant to the protection of marine fisheries and wildlife habitat because they provide habitats for marine organisms such as polychaete worms and mollusks, which in turn are food sources for fisheries and migratory and wintering birds. Coastal beaches are extremely important in recycling of nutrients derived from storm drift and tidal action. Vegetative debris along the drift line is vital for resident and migratory shorebirds, which feed largely on invertebrates which eat the vegetation. Below the drift line in the lower intertidal zone are infauna (invertebrates such as mollusks and crustacea) which are also eaten by shore birds. Tidal flats are also sites where organic and inorganic materials may become entrapped and then returned to the photosynthetic zone of the water column to support algae and other primary producers of the marine food web. When a proposed project involves the dredging, filling, removing, or altering of a coastal beach, the issuing authority shall presume that the coastal beach is significant to the interests specified above. This presumption may be overcome only upon a clear showing that a coastal beach does not play a role in storm damage prevention, flood control, or protection of wildlife habitat, or that tidal flats do not play a role in the protection of marine fisheries or land containing shellfish, and if the issuing authority makes a written determination to such effect.

When coastal beaches are determined to be significant to storm damage prevention or flood control, the following characteristics are critical to the protection of those interests:
(a) volume (quantity of sediments) and form; and
(b) the ability to respond to wave action.

When coastal beaches are significant to the protection of marine fisheries or wildlife habitat, the following characteristics are critical to the protection of those interests:
(a) distribution of sediment grain size;
(b) water circulation;
(c) water quality; and
(d) relief and elevation.

When tidal flats are in a designated port area, 310 CMR 10.26(1) through (4) shall apply. When tidal flats are significant to land containing shellfish, 310 CMR 10.34(1) through (8) shall apply.

(2) Definitions.
Coastal Beach means unconsolidated sediment subject to wave, tidal and coastal storm action which forms the gently sloping shore of a body of salt water and includes tidal flats. Coastal beaches extend from the mean low water line landward to the dune line, coastal bankline or the seaward edge of existing human-made structures, when these structures replace one of the above lines, whichever is closest to the ocean.

Tidal Flat means any nearly level part of a coastal beach which usually extends from the mean low water line landward to the more steeply sloping face of the coastal beach or which may be separated from the beach by land under the ocean.

WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(3) THROUGH (7) SHALL APPLY:

(3) Any project on a coastal beach, except any project permitted under 310 CMR 10.30(3)(a), shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift coastal beach.

(4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:

(a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume. In evaluating necessity, coastal engineering, physical oceanographic and/or coastal geologic information shall be considered.

(b) Immediately after construction any groin shall be filled to entrapment capacity in height and length with sediment of grain size compatible with that of the adjacent beach.

(c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

(5) Notwithstanding 310 CMR 10.27(3), beach nourishment with clean sediment of a grain size compatible with that on the existing beach may be permitted.

WHEN A TIDAL FLAT IS DETERMINED TO BE SIGNIFICANT TO MARINE FISHERIES OR THE PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(6) SHALL APPLY:

(6) In addition to complying with the requirements of 310 CMR 10.27(3) and (4), a project on a tidal flat shall if water-dependent be designed and constructed, using best available measures, so as to minimize adverse effects, and if non-water-dependent, have no adverse effects, on marine fisheries and wildlife habitat caused by:

(a) alterations in water circulation;
(b) alterations in the distribution of sediment grain size; and
(c) changes in water quality, including, but not limited to, other than natural fluctuations in the levels of dissolved oxygen, temperature or turbidity, or the addition of pollutants.

(7) Notwithstanding the provisions of 310 CMR 10.27(3) through (6), no project may be permitted which will have any adverse effect on specified habitat sites or rare vertebrate or invertebrate species, as identified by procedures established under 310 CMR 10.37.

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss

SUPERIOR COURT
CIVIL ACTION
NO. 2014-00438

MIRAMAR PARK ASSOCIATES, INC. & others[1]

vs.

TOWN OF DENNIS

MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

The claim before the Court concerns the long-scheduled dredging of Swan River, a tidal estuary in Dennis, and the possible environmental impact on nearby beach areas owned by the plaintiffs, two individual landowners and a neighborhood association (collectively, "Miramar"). The Town of Dennis has obtained both a local and state permit to dredge approximately 20,000 cubic yards of sediment from the mouth of Swan River to alleviate eutrophoication of the upstream Swan Pond which produces noxious odors and unfavorable aquatic ecosystem conditions. The parties agree that this maintenance dredging of Swan River is in the public interest and properly pursued by the Town.

However, Miramar quarrels with the Town's planned use of the dredged material, termed 'spoils'. The Town has obtained permits to pump the spoils out of the Swan River estuary system to West Dennis Beach, a town-owned property approximately a mile away that also experiences erosion-related problems. Dredging and deposition of spoils was scheduled to begin

[1]Ronald J. Mastrocola, as Trustee of the Judy Mastrocola Qualified Personal Residence Trust, and Ellen Rooney.

today, September 15, 2014 and continue for a period of approximately two weeks; pipes required to pump the spoils have already been laid by the Town in anticipation of the start date. The plaintiffs bring the instant motion for a temporary restraining order halting the planned dredging under the auspices of General Laws Chapter 214, § 7A, claiming immediate and irreparable harm in the form of resulting erosion from their beaches.

The essence of Miramar's complaint is the applicability of 310 Code of Massachusetts Regulations 10.27(4)(c), which states that "jetties trapping littoral drift material shall contain a sand-bypass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that the downdrift beaches are not starved of sediments." The plaintiffs' beaches are downdrift of the jetty located on the west side of Swan River; they claim that 310 Code Mass. Regs. 10.27(4)(c) requires the Town to deposit the dredge spoils onto their properties so as to not starve them of sediments they would otherwise receive in the absence of the jetty. Accordingly, the plaintiffs argue that the state and local permits allowing the deposition of the spoils on West Dennis Beach were issued in error, and seek to delay the dredging operations until the plaintiffs can obtain a permit to deposit the dredge spoils on Miramar Park Beach instead. For the following reasons, the Court declines to order the delay of the dredging.

First, while the Court is authorized to waive the 21 day notice to the Town required for the plaintiffs to file this type of complaint, the Court is reluctant to do so as the scheduled dredging was set for September 15, 2014, some time prior to the plaintiffs' institution of this action. The costs to the Town have not been calculated, but it is clear that some costs would be incurred if the project were to be halted by order of this court. Moreover, as expressed by Town

counsel, the window to perform this type of work is limited by the seasons. Second, while Miramar has made a strong case that the application and interpretation of 310 Code Mass. Regs. 10.27(4)(c) requires the Town to deposit the dredge spoils downdrift (that is, in the direction of Miramar Park Beach), there are substantial defenses by the Town that such collateral attack has been waived by Miramar's failure to pursue timely administrative appeals of the local and state permits. Third, the parties will be afforded a speedy trial to resolve this legal issue, and if Miramar is proven correct, the likely outcome is that all future dredging (which is expected to occur) will be in the manner desired by Miramar. Fourth, in the event that there is erosion damage to Miramar's beach, it is a matter that can be resolved through potential remediation orders by this Court.

Thus, in considering the likelihood of success on the merits, and more importantly, balancing the equities, the Court finds that the plaintiffs' motion for a temporary restraining order pursuant to G. L. c. 214, § 7A must be **DENIED**.

Christopher J. Muse
Justice of the Superior Court

Dated: September 15, 2014

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT
BACV2014-00438

MIRAMAR PARK ASSOCIATION & others[1]

vs.

TOWN OF DENNIS

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Miramar Park Association, Inc. ("the Association") and the individual homeowners filed this action pursuant to G.L. c. 214, § 7A seeking to enjoin the Town of Dennis from depositing dredged sediment on a Town-owned updrift beach instead of depositing it on the down drift beach owned by the Association. This matter is before the court on the Plaintiffs' Motion For Summary Judgment pursuant to Mass. R. Civ. P. 56 and the Defendant Town of Dennis' Cross-Motion For Summary Judgment. For the reasons discussed below, the Plaintiffs' motion is **ALLOWED** and the Town's Cross-Motion is **DENIED**.

[1]Ronald J. Mastrocola, as trustee of the Judy Mastrocola Qualified Personal Residence Trust; Ellen Rooney; Mary E. Pendergast Dwyer, as trustee of Miramar Realty Trust; Philip Ryan; Robert S. Crespi and Louise M. Crespi, as trustees of the Crespi Dennisport Realty Trust; Timothy F. Keefe; Anne M. Keefe; Joseph F. Lawlor; Susan D. Lawlor; Daniel T. Bagley; Maryanne T. Bagley; Stephen A. Sousa; Susan E. Sousa; Robert E. Barrows; Clyde N. Grindell, as trustee of the Grindell Nominee Trust; Richard B. McGaughey; Josephine McGaughey; Gregory E. Hayes; Margaret E. Hayes; James T. Lynch; Kathleen Lynch; Mark Scamman; Amy Scamman; Dean Wasniewski; Annemarie Wasniewski; and Richard and Susan Dieter as trustees of Miramar Avenue 75 Realty Trust

BACKGROUND

The undisputed facts revealed by the summary judgment record are as follows. The Association is an incorporated non-profit organization that owns a beach on Nantucket Sound located at the end of Miramar Road in Dennisport ("Miramar Beach"). The beach lot is shown as Lot 88 on Plan 11503-J recorded in the Barnstable Registry District of the Land Court. The individual plaintiffs each own a lot of land within a beach community in Dennisport known as Miramar Park. Each individual plaintiff is a member of the Association and has an easement appurtenant to the land to use Miramar Beach for recreational activities.

To the west of Miramar Beach is a tidal river, Swan Pond River. There is no jetty on the easterly side of the river. There is a stone jetty located on the westerly side of the mouth of Swan Pond River that traps littoral drift material. By interrupting the flow of sediment, the jetty leaves the down drift Miramar Beach with a deficit of sediment. The jetty does not have a sand by-pass system. Miramar Beach, on the east side of the river, is eroding; the beach on the westerly side of the jetty is accreting; and the mouth of the Swan Pond River is filling in, reducing the tidal flow in the river. The reduced tidal flow has reduced the flushing of Swan Pond, a pond at the end of the river. The reduced flushing of the pond has resulted in algae blooms, fish kills, and foul odors.

In the late 1980s and early 1990s, the Town spent $200,000 to obtain engineering services, extend the jetty, dredge, and perform water testing to increase the tidal flow within Swan Pond River and Swan Pond. In November of 1990, the Town acquired easements from the owners of the property on which the jetty is situated for "dredging, rip rap, and environmental purposes." Those easements include "the right to excavate and remove dredging material; to place dredging material; to maintain, repair and improve an existing revetment; to construct, maintain and repair a new revetment; [and] to perform related work necessary for said purposes. . . ." The Town performed

maintenance and repair work on the jetty, and expanded and lengthened it. Despite these efforts, there continued to be a periodic buildup of sediment at the entry of the mouth of the Swan Pond River.

In October of 1992, twenty-five residents of Miramar Park petitioned the Board of Selectmen requesting that the Town build a second jetty at the mouth of Swan Pond River to trap the sand eroding from Miramar Beach and stabilize the mouth of the river. The petition also requested that the Town dredge the mouth of the river and place the dredge material on the eroding Miramar Beach. In the Spring of 1994, the Town began to formulate plans to dredge the river and place the dredge spoils onto Miramar Beach. In April of 1994, the Town acquired a permanent easement from Virginia Thomason, who at that time owned Miramar Beach, that granted the Town and the public a permanent right of on-foot passage along and across the shore of the coastline. On June 28, 1994, the Board of Selectmen voted to accept the Thomason easement and easements from Miriam Plumb and Nathaniel Rutter, for the purposes of dredging the mouth of Swan Pond River and placing the dredge spoils on the east side of the river. The easements state that the beach will be restored, enhanced, and protected by the publicly funded beach nourishment project.

In 1996, the Town dredged the mouth of the Swan Pond River and deposited the dredge spoils on Miramar Beach. The Town's dredging of Swan Pond River was and is publicly funded. This beach nourishment improved the condition of Miramar Beach. However, over time, Miramar Beach continued to erode and sand from the beach flowed into the mouth of Swan Pond River, obstructing the tidal flow.

In 2008, the Town began planning an emergency project to protect a bulkhead on West Dennis Beach, a public beach owned by the Town one mile west of Swan Pond River. The Town planned to dredge Swan Pond River and deposit the dredge spoils on West Dennis Beach, forming

a sand dune to protect the bulkhead. The Association inquired why the Town planned to transport the sand to West Dennis Beach instead of depositing it on Miramar Beach. In a January 20, 2009 email, the Town's Natural Resource Officer, Brian Malone ("Malone"), informed the Association that the dredging would improve the water quality of Swan Pond which recently had opened for shellfishing after twenty years, and that construction of a dune at West Dennis Beach was necessary to protect the parking lot and integrity of the barrier beach. Malone noted that the Town Meeting appropriation for the dredging was limited to expenditure at West Dennis Beach. Malone further stated:

> The Department is aware that in March of 1994, a few residents located along Miramar Avenue, agreed to grant an "on-foot" right-of-passage easement, in perpetuity to the general public, and that the Town agreed to deposit dredge material on the beach of the Miramar properties.
>
> The DNR file in this matter contains several letters from the former Director of Natural Resources, George MacDonald, to these property owners, wherein he informed the Grantors of the Easements that the dredge spoils deposited on their beaches, in exchange for granting the Easements, were limited to the **"existing permits"** which expired in 2003. He stated: *"the Town will have to go through a new permit process again and seek new permits. Any new permit would give the Town the right to seek any new disposal area . . . in the best interest of the Town."*
>
> We have received an opinion from our Town Counsel, stating that the easements granted in 1994 by their terms do not convey a duty to perform ongoing beach nourishment to the Miramar properties.

(emphasis in original).

In 2010, the Town proceeded with the emergency project and dredged 30,000 cubic yards of sediment from the mouth of Swan Pond River and deposited it on West Dennis Beach. Thereafter, the plaintiffs observed significant erosion of Miramar Beach and accretion of sand in the mouth of Swan Pond River. In connection with the 2010 dredging, the Town obtained permits from the

Dennis Conservation Commission under the Wetlands Protection Act ("WPA") and the Town Wetlands Bylaw. In addition, the Town obtained permits from DEP under the Chapter 91 Waterways Act; the 401 Water Quality Certification Program; and the Massachusetts Environmental Policy Act ("MEPA"). The Town filed with the Division of Fisheries and Wildlife Natural Heritage and Endangered Species Program, and obtained a public benefit determination from the Executive Office of Energy and Environmental Affairs. Neither the Association nor any of the individual plaintiffs brought an administrative or judicial appeal of any of these permits or approvals.

The Association retained coastal geologist Stanley Humphries of LEC Environmental Consultants, Inc. to conduct a study of Miramar Beach. LEC's July 2012 report concluded that the construction of a stone jetty on the west side of the inlet changed the dynamics of the natural sediment transport direction, causing Miramar Beach to begin to erode. The report concluded that the 2010 dredging of 30,000 cubic yards of sediment adversely affected Miramar Beach, which would benefit from dredged materials being placed there in the future. LEC's report opined that the Town had violated 310 Code Mass. Regs. § 10.27(4)(c), which states that jetties trapping littoral drift material shall contain a sand bypass system to transfer sediments to the down drift side of the inlet or shall be periodically re-dredged to provide beach nourishment to down drift beaches. While conducting research for the LEC report, Humphries learned that the Town had retained the Woods Hole Group to perform a study of the coastal processes at work at the mouth of the Swan Pond River. Woods Hole Group prepared a November 2010 report for the Town entitled, "Final Waterway Assets and Resources Survey Master Plan for Dredging and Beach Nourishment For Town of Dennis, Massachusetts." This report reached the same conclusion as LEC that the dominant sediment transport direction in the vicinity of Swan Pond River is west to east.

In September of 2012, counsel for the Association and some of its members met with Town

officials to express their concerns about the Town's maintenance dredging. However, the Association did not mount any legal challenge to the Town's plans at that time.

The Town planned to perform maintenance dredging of Swan Pond River in September of 2014 and deposit the dredged materials on West Dennis Beach to fortify the Town's bulkhead. The Association requested that the Town deposit the dredge spoils on Miramar Beach, but the Town refused to do so. The proposed dredging was authorized under the State permits previously obtained in 2010. In addition, the Town obtained a Section 404 Programmatic General Permit from the U.S. Army Corps of Engineers. The Association did not file any appeal of that permit.

On September 10, 2014, the Association and the individual plaintiffs filed this action pursuant to G.L. c. 214, § 7A, alleging imminent environmental harm from the Town's anticipated maintenance dredging. The Association seeks a declaratory judgment that the Town's planned dredging violates 310 Code Mass. Regs. § 10.27(4)(c) and will cause erosion to Miramar Beach. The Association also seeks a permanent injunction restraining the Town from performing any dredging of Swan Pond River unless the dredge spoils are placed on Miramar Beach in compliance with 310 Code Mass. Regs. § 10.27(4)(c).

In a Memorandum of Decision and Order dated September 15, 2014, this Court (Muse, J.) denied the temporary restraining order sought by the Association, noting that the Town had substantial defenses to the Association's claims and that any erosion to Miramar Beach caused by the scheduled dredging could be remediated through court order should the Association succeed on the merits. The Town performed the dredging as planned in September of 2014 and deposited the dredge spoils on West Dennis Beach. Since the September 2014 dredging, there has been a significant build up of sediment at the mouth of the river which has negatively affected navigation and reduced the flow of the river, causing algae blooms and fish kills.

As recommended by the Woods Hole Group report, the Town is currently developing a 10-Year Comprehensive Dredge Plan for dredging at numerous locations and the use of the dredge spoils to nourish several Town-owned beaches. Under this Plan, the Town is seeking a comprehensive permit from various agencies to consolidate dredging and material disposal activities, rather than seeking numerous permits for individual projects. The Town submitted an Expanded Environmental Notification Form to the Secretary of Energy and Environmental Affairs ("the Secretary") pursuant to MEPA. The Secretary acknowledged the receipt of public comments from the Association asserting that the Town was required to deposit the dredge spoils on Miramar Beach. The Secretary noted that if the Town obtains surplus dredging materials from its projects, it will consider selling the material to outside parties under Chapter 30B. On October 23, 2015, the Secretary issued a Certificate to the Town certifying that the Town's proposal does not require the filing of an Environmental Impact Report.

The Town planned to conduct further dredging of 5,000 cubic yards of material from the mouth of Swan River Pond in November of 2016. On May 3, 2016, the Town Meeting voted to raise and appropriate $50,000 in funds for the Town's Harbor Department to dredge Swan Pond River. The cost to the Town is approximately nine to twelve dollars per cubic yard. The Town planned to deposit the dredge spoils at West Dennis Beach, which has experienced significant erosion in recent years. The deposited sand will serve the following purposes: beach nourishment, storm protection, protection of wildlife habitat, and bolstering the sand dune that protects a public parking lot. This dredging would be a continuation of the maintenance dredging project that was previously permitted in 2009, 2010, and 2014. The permits that allowed the prior dredging remain in effect, except for the permit from the U.S. Army Corps of Engineers, which has expired. The Town is seeking an extension of that permit, but the Town's inability to obtain one will delay the

planned dredging until 2017.

DISCUSSION

Summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). The party moving for summary judgment bears the burden of affirmatively showing that there is no triable issue of fact. Pederson v. Time, Inc., 404 Mass. 14, 17 (1989). A party moving for summary judgment who does not have the burden of proof at trial may demonstrate the absence of a triable issue either by submitting affirmative evidence negating an essential element of the nonmoving party's case, or by showing that the nonmoving party has no reasonable expectation of proving an essential element of its case at trial. Kourouvacilis, 410 Mass. at 716. Once the moving party "establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact." Pederson, 404 Mass. at 17.

Chapter 214, section 7A allows ten citizens of a county to bring suit in Superior Court seeking an injunction against "damage to the environment [which] is occurring or is about to occur," if the damage "constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." G.L. c. 214, § 7A. The Town contends that the Association has no reasonable expectation of proving damage to the environment because the dredging at issue has already been reviewed and approved by numerous State and Federal environmental agencies. See, e.g., Collora v. Newton Conservation Comm'n, 1995 WL 1146116 at *3 (Mass. Super. Ct.) (Smith, J.) (granting summary judgment where plaintiffs failed to allege specific significant environmental impact from proposed residential development that was

subject to DEP Order of Conditions to protect environment, "convincing this court that G.L. c. 214, § 7A does not apply."). Foremost, it is unclear from the record whether, in issuing permits under the WPA, the Conservation Commission and DEP considered the issue of compliance with 310 Code Mass. Regs. § 10.27(4)(c). Further, this Court is not persuaded that a project permitted by a regulatory agency can never be deemed to pose a threat of damage to the environment for purposes of § 7A. See, e.g., Canton v. Commissioner of the Mass. Highway Dept., 455 Mass. 783, 793 (2010) (noting that for purposes of MEPA, issuance of DEP permit for project marks time when harm to environment is about to occur under § 7A). Cf. Lummis v. Lilly, 385 Mass. 41, 46-47 (1982) (license from regulatory authority does not immunize licensee from liability from negligence or nuisance flowing from licensed activity).

The Town further contends that the Association has no reasonable expectation of proving damage to the environment because damage to a private beach is not a protected interest under § 7A. The statute defines damage to the environment as "any destruction, damage or impairment, actual or probable, to any of the natural resources of the commonwealth . . . ." G.L. c. 214, § 7A. The statute does not, by its terms, restrict the availability of relief to damage to natural resources owned by the Commonwealth. See Canton v. Commissioner of the Mass. Highway Dept., 455 Mass. at 794 (court will not read into statute words that Legislature could have but chose not to include). The Legislature apparently recognized that the public interest in the environment is served by preventing damage to natural resources located on private property. See, e.g., Joyal v. Marlborough, 1995 WL 809017 at *3 (Mass. Super. Ct.) (Cowin, J.) (enjoining under § 7A operation of composting facility where damage to environment was allegedly caused by violation of DEP air pollution regulation, and consisted of neighbors' inability to enjoy their private property due to noxious odors). The "destruction of seashores" is specifically included in the § 7A definition of damage to the

environment. Accordingly, the Town is not entitled to judgment as a matter of law on the ground that the harm shown is the erosion of a privately owned beach.

The Town next contends that the Association cannot establish that it violated an environmental statute or regulation as required by G.L. c. 214, § 7A. See Ten Persons of the Commonwealth v. Fellsway Develop., LLC, 460 Mass. 366, 375 (2011) (relief under § 7A requires damage caused by violation of environmental statute or regulation). The Association's claim is premised on a DEP regulation regarding coastal beaches that provides in relevant part:

> WHEN A COASTAL BEACH IS DETERMINED TO BE SIGNIFICANT TO STORM DAMAGE PREVENTION, FLOOD CONTROL, OR PROTECTION OF WILDLIFE HABITAT, 310 CMR 10.27(3) THROUGH (7) SHALL APPLY:
>
> (3) Any project on a coastal beach . . . shall not have an adverse effect by increasing erosion, decreasing the volume or changing the form of any such coastal beach or an adjacent or downdrift beach.
>
> (4) Any groin, jetty, solid pier, or other such solid fill structure which will interfere with littoral drift, in addition to complying with 310 CMR 10.27(3), shall be constructed as follows:
>
> (a) It shall be the minimum length and height demonstrated to be necessary to maintain beach form and volume. . .
> (b) Immediately after construction any groin shall be filled to entrapment capacity in height and length with sediment of grain size compatible with that of the adjacent beach.
> (c) Jetties trapping littoral drift material shall contain a sand by-pass system to transfer sediments to the downdrift side of the inlet or shall be periodically redredged to provide beach nourishment to ensure that downdrift or adjacent beaches are not starved of sediments.

310 Code Mass. Regs. § 10.27. The Association argues that the Town's maintenance dredging violates § 10.27(4)(c) because the jetty near Swan Pond River traps littoral drift material and lacks a sand bypass system, leaving the down drift Miramar Beach with a deficit of sediment, but the Town has failed to deposit dredge spoils on Miramar Beach.

"The purpose of 310 CMR 10.00 is to define and clarify [the decision-making] process by establishing standard definitions and uniform procedures by which conservation commissions and the Department may carry out their responsibilities under M.G.L. c. 131, § 40." 310 Code Mass. Regs. § 10.01(2). The regulations applicable to coastal wetlands are set forth at § 10.21 through § 10.37. The introduction to these regulations explains that:

> 310 CMR 10.21 through 10.37 apply to all work subject to M.G.L. c. 131, § 40, which will alter, dredge, fill, or remove any coastal beach, coastal dune, tidal flat, coastal wetland [etc.]. 310 CMR 10.27 through 10.37 are intended to ensure that development along the coastline is located, designed, built and maintained in a manner that protects the public interest in the coastal resources listed in M.G.L. c. 131, § 40. The proponent of the work must submit sufficient information to enable the issuing authority to determine whether the proposed work will comply with 310 CMR 10.27 through 10.37 . . . . 310 CMR 10.27 through 10.37 are in the form of performance standards and shall be interpreted to protect those characteristics and resources to the maximum extent possible under M.G.L. c. 131, § 40.

310 Code Mass. Regs. § 10.01(1). Thus, the regulation cited by the Association is a performance standard to be applied by the Conservation Commission and/or DEP when issuing an order of conditions for a project under the WPA. It is unclear who originally constructed the jetty at issue, which occurred several decades ago. To the extent that the regulation applies to the construction of a jetty on a coastal beach, the Town is correct that it is not triggered by the periodic dredging of Swan Pond River, which is not a coastal beach but rather, land under ocean. See 310 Code Mass. Regs. § 10.25(1) &(2). See also § 10.25(3) &(4) (establishing standards for dredging for navigational purposes of land under ocean). However, a violation of § 10.27(4)(c) occurred when the Town repaired, expanded, and lengthened the jetty sometime in the 1990s without including a sand bypass system as required by DEP performance standards. See 310 Code Mass. Regs. § 10.01(1) (explaining that regulations are intended to ensure that coastal development is "built and maintained" in manner

that protects coastal resources).

Further, in September of 2014, the Town conducted not only dredging but also coastal beach nourishment activities, and it plans to do so again in 2017. The applicable Order of Conditions for dredging Swan Pond River contains the following condition: "All dredge spoils shall be de-watered and/or transported to upland locations in excess of 100 feet of wetland resource areas or to a permitted beach nourishment project." In addition, the Town obtained a separate Order of Conditions to deposit the dredge spoils on West Dennis Beach. The Town's 10-Year Comprehensive Dredge Plan addresses dredging and beach nourishment in tandem. Thus, the Town is engaged in activities that trigger the application of the coastal beach regulations.

It appears that § 10.27(4)(c) creates an ongoing obligation by the Town, after repairing and expanding the jetty, to offset its adverse effects on down drift beaches such as Miramar Beach. It is undisputed that the Town has not re-nourished Miramar Beach since 1996 and that Miramar Beach continues to suffer ongoing erosion from the presence of the jetty, exacerbated by the dredging of a large volume of sediment from Swan Pond River in 2010. Thus, it appears that the Town is violating § 10.27(4)(c) by failing to periodically re-dredge the area of the jetty to provide beach nourishment to ensure that down drift beaches such as Miramar Beach are not starved of sediments.

The conundrum for this Court is that the Association insists that every time the Town dredges Swan Pond River for any purpose, such as navigation, the regulation requires it to deposit the spoils on Miramar Beach. This interpretation of § 10.27(4)(c), which is not supported by its plain language, goes too far. The regulation does not purport to require that beaches down drift from a jetty receive priority in re-nourishment over all other coastal beaches.[2] Accordingly, the Association

[2]The Association's argument fails to recognize the significant public interest in nourishing eroding Town-owned beaches, as well as the Town's authority and discretion in allocating its environmental protection efforts and financial resources.

is not entitled to the specific relief it seeks: a declaration that any future dredging of Swan Pond River and depositing the spoils on an updrift beach instead of Miramar Beach violates 310 Code Mass. Regs. § 10.27(4)(c) and a permanent injunction restraining the Town from performing any dredging of Swan Pond River unless the dredge spoils are deposited on Miramar Beach. Rather, the Association is entitled only to an order that the Town engage in periodic dredging of Swan Pond River to re-nourish Miramar Beach as required by 310 Code Mass. Regs. § 10.27(4)(c).

The Town contends that such an order would violate DEP's Chapter 91 Waterways regulations, which establish operational requirements for dredged material disposal. Section 9.40 of the regulations states that "in the case of a publicly-funded dredging project, such material shall be placed on publicly-owned eroding beaches; if no appropriate site can be located, private eroding beaches may be nourished if easements for public access below the existing high water mark can be secured by the applicant from the owner of the beach to be nourished." 310 Code Mass. Regs. § 9.40(4)(a). The Town argues that depositing the dredge spoils on Miramar Beach would violate this provision, given that there are Town-owned beaches such as West Dennis Beach that are eroding. However, it appears that permitting under the WPA is a prerequisite to permitting under Chapter 91. See 310 Code Mass. Regs. § 9.11(3)(c)(3)(d) (completed application for a waterways license must include final Order of Conditions under WPA). Thus, in obtaining any Order of Conditions for future dredging of Swan Pond River, the Town can seek inclusion of the condition that the spoils be deposited on Miramar Beach in compliance with 310 Code Mass. Regs. § 10.27(4)(c). Such a condition presumably would lead DEP to waive any violation of § 9.40(4)(a). Cf. FMR Corp. v. Commissioner of Revenue, 441 Mass. 810, 819 (2004) (related statutes must be construed together as harmonious whole).

The Town further contends that an order to periodically re-nourish Miramar Beach with dredge spoils would violate the State Procurement Act. Chapter 30B, section 15(a) provides: "A governmental body shall dispose of a tangible supply, no longer useful to the governmental body but having resale or salvage value, in accordance with this section." Section 15(b) provides: "The governmental body shall offer such supply through competitive sealed bids, public auction, or established markets." In the view of this Court, dredge spoils that are needed to re-nourish Miramar Beach in accordance with 310 Code Mass. Regs. § 10.27(4)(c) do not constitute a supply that is no longer useful within the meaning of the Procurement Act.

In addition, the Town contends that an order to periodically re-nourish Miramar Beach with dredge spoils would violate the Anti-Aid Amendment to the Massachusetts Constitution by using public funds to benefit the Association's private property. See Mass. Const. Art. 46, § 2, as amended by art. 103 of the Amendments. The purpose of art. 46 is to prevent the transfer of appropriated funds to non-public institutions. Benevolent & Prot. Order of Elks Lodge, No. 65 v. Planning Bd. of Lawrence, 403 Mass. 531, 553 (1988). In determining whether an expenditure of public funds would violate the Anti-Aid Amendment, the court looks at whether the purpose of the expenditure is to aid a non-public institution, whether it does in fact substantially aid the non-public institution, and whether any such aid is politically or economically abusive or unfair. Helmes v. Commonwealth, 406 Mass. 873, 876-878 (1990). Public expenditures made for a public purpose do not violate the Anti-Aid Amendment simply because they also provide a benefit to private parties. See id. The purpose of an expenditure by the Town to dredge Swan Pond River and deposit the spoils on Miramar Beach is to serve the public interest by maintaining the river as a navigable waterway, preventing foul odors and fish kills in Swan Pond, and complying with WPA regulations. Any incidental aid to the Association is not politically or economically abusive or unfair and does not

cause the expenditure to run afoul of the Anti-Aid Amendment.[3]

The Town insists that an order to periodically re-nourish Miramar Beach with dredge spoils would violate the terms of the numerous permits and permissions granted by various State and Federal agencies that reviewed and approved the Town's plan to perform maintenance dredging and deposit the spoils on West Dennis Beach. Moreover, the Town emphasizes that the deposit of spoils on Miramar Beach would require a new Order of Conditions from the Conservation Commission and possibly a Chapter 91 permit from DEP. However, as discussed *supra*, the Association is not entitled to injunctive relief prohibiting the Town from dredging Swan Pond River unless it deposits the spoils on Miramar Beach instead of West Dennis Beach. Rather, the Association only is entitled to an injunction requiring the Town to engage in periodic dredging of Swan Pond River to re-nourish Miramar Beach as required by 310 Code Mass. Regs. § 10.27(4)(c). The Town may choose to modify any anticipated dredging to meet this obligation and seek the necessary amendments to existing permits, or may plan separate dredging in the future to re-nourish Miramar Beach and obtain the necessary permits.

Finally, the Town contends that the Association is not entitled to relief due to its failure to exhaust administrative remedies with respect to the deposit of dredge spoils on West Dennis Beach rather than Miramar Beach. It is well established that an aggrieved party cannot evade the need to timely appeal an administrative decision by seeking to recast its claim as one for declaratory or other judicial relief. Iodice v. Newton, 397 Mass. 329, 333-334 (1986); School Comm. of Franklin v. Commissioner of Educ., 395 Mass. 800, 807-808 (1985). The Town argues that the Association cannot now obtain an injunction because it failed to appeal any of the myriad permits the Town

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[3]Moreover, the Anti-Aid Amendment permits appropriations to carry out legal obligations already entered into. See Mass. Const. Art. 46, § 2, as amended by art. 103 of the Amendments.

sought and received in connection with the dredging of Swan Pond River in 2010, which permits also authorized the 2014 dredging. See, e.g., Earthsource, Inc. v. Department of Envtl. Prot., 2014 WL 5326510 at *1 (Mass. App. Ct. Rule 1:28) (plaintiffs who failed to timely appeal issuance of several environmental permits could not bring G.L. c. 214, § 7A action alleging that environmental harm was occurring or about to occur from operation of waste incinerators under those permits). Cf. Conservation Comm'n of Falmouth v. Pacheco, 49 Mass. App. Ct. 737, 741 (2000) (failure to exhaust administrative remedies by appealing conservation commission decision to DEP precluded applicant from asserting commission's lack of jurisdiction in Superior Court enforcement action); Bonfatti v. Zoning Bd. of App. of Holliston, 48 Mass. App. Ct. 46, 48-49 (1999) (failure to appeal Planning Board's determination that subdivision had only two buildable lots precluded judicial review of issue in form of appeal from building inspector's refusal to issue building permit for third lot).

Foremost, it is unclear from the summary judgment record whether the Association received notice of or participated in the various permitting proceedings in 2009 and 2010 that led to the issuance of the permits authorizing the 2010 and 2014 dredging.[4] Nor has the Town established that the Association was an aggrieved party entitled to pursue an administrative or judicial appeal of those permits under the relevant statutory schemes. Further, in the view of this Court, the failure to exhaust administrative remedies does not apply in the circumstances of this case where the ongoing environmental violation is not the depositing of dredge spoils on West Dennis Beach per se but

[4]In contrast, the record reveals that the Association was involved in the MEPA process with respect to the Town's pursuit of approval for the 10-Year Comprehensive Dredge Plan. In October of 2015, LEC submitted comments to the Secretary of Energy and Environmental Affairs on behalf of the Association, asserting that the Town was required to deposit all dredge spoils on Miramar Beach under 310 Code Mass. Regs. § 10.27(4)(c).

rather, the Town's failure to periodically re-nourish Miramar Beach as required by 310 Code Mass. Regs. § 10.27(4)(c).

Thus, this Court concludes that the Association has proved that damage to the environment, the erosion of Miramar Beach, is occurring or is about to occur from the Town's failure to periodically re-nourish the beach as required by 310 Code Mass. Regs. § 10.27(4)(c). It is therefore entitled to declaratory and injunctive relief under G.L. c. 214, § 7A.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Plaintiffs' Motion For Summary Judgment be **ALLOWED** and that the Defendant Town of Dennis' Cross-Motion For Summary Judgment be **DENIED**. It is hereby **ADJUDGED** and **DECLARED** that the Town is obligated to periodically dredge Swan Pond River to re-nourish Miramar Beach pursuant to 310 Code Mass. Regs. § 10.27(4)(c). It is further **ORDERED** that the Town of Dennis is **PERMANENTLY ENJOINED** from violating 310 Code Mass. Regs. § 10.27(4)(c) and must comply with that regulation forthwith.

Cornelius J. Moriarty, II
Justice of the Superior Court

DATED: January , 2017

A true copy, Attest:
Clerk

Collora v. Newton Conservation Comm'n

Superior Court of Massachusetts, at Middlesex

November 29, 1995, Decided ; November 30, 1995, Filed

94-07159-A

Reporter
1995 Mass. Super. LEXIS 237 *; 1995 WL 1146116

Michael Collora et al. [1] v. Newton Conservation Commission et al. [2]

Disposition: [*1] Summary judgment entered for defendants Newton Conservation Commission and Nicholas Heras, Jr.

Core Terms

flooding, floodplain, summary judgment, drainage, Ordinances, hearings

Case Summary

Procedural Posture

Defendants, a developer and a conservation commission, filed a motion for summary judgment pursuant to Mass. R. Civ. P. 56, in response to plaintiff residents' challenge to construction of a residential subdivision.

Overview
The residents challenged an order issued by the Newton Conservation Commission, which allowed the construction of a residential subdivision, a portion of which would be located within a floodplain. They alleged that the proposed subdivision would violate the Floodplain/Watershed Protection Provisions of the Newton Revised Ordinances. The developer submitted the affidavit of a civil engineer who stated that the roadway and drainage system at the site would actually improve drainage and opined that the project would not result in any increase in flood levels on the project site or in surrounding areas. The court held that the residents offered no proof of actual or potential harm. Their lay opinion that construction on a floodplain would result in increased flooding was unsupported by evidence or scientific analysis, and did not create a general dispute of material fact. Further, the residents' failure to specify the nature of the alleged environmental impact prevented them from establishing that any significant impact would occur.

Outcome
The court granted defendants' motion for summary judgment.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1 **Summary Judgment, Burdens of Proof**

A court grants summary judgment where there are no genuine issues of material facts and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c). The moving party bears the burden of affirmatively

[1] Margaret Albright, Michael Clarke, Elizabeth Clarke, Lawrence Kaplan, Robin Washington, William Hagar, Lucille Kaplan, Katherine Knight, Charles Knight, George Moody, Ellen Moody and Kay Pike.

[2] Nicholas Heras, Jr.

demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. The nonmoving party's failure to prove an essential element of its case renders all other facts immaterial and mandates summary judgment in favor of the moving party.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2 **Declaratory Judgments, State Declaratory Judgments**

Generally, only those who have themselves suffered legal harm, or who are in danger of suffering legal harm have standing to go forward with a claim. This requirement of standing is not avoided by a prayer for declaratory relief under *Mass. Gen. Laws ch. 231A, §1*.

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN3 **Appellate Jurisdiction, State Court Review**

A plaintiff may pursue a civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law. *Mass. Gen. Laws ch. 249, § 4* (1986, Supp. 1995). In order for an appellate court to exercise its discretion to grant certiorari, the plaintiffs must demonstrate that the decision has resulted in substantial injury or manifest injustice to them.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN4 **Injunctions, Grounds for Injunctions**

The superior court may grant injunctive relief in cases in which not less than ten persons domiciled within the commonwealth are joined as plaintiffs, if damage to the environment is occurring or about to occur, and the damage caused or about to be caused constitutes a violation of a statute, ordinance, by-law, or regulation the major purpose of which is to prevent or minimize damage to the environment. *Mass. Gen. Laws ch. 214, § 7A* (1986).

Judges: Smith.

Opinion by: SMITH

Opinion

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This case comes before the court on the motion for summary judgment of defendants Newton Conservation Commission and Nicholas Heras, Jr., pursuant to *Mass.R.Civ.P. 56*.

In the underlying action, the plaintiffs challenge an Order of Conditions issued by the Newton Conservation Commission to allow the construction of a residential subdivision, a portion of which would be located within a floodplain. They allege that the proposed subdivision would violate the Floodplain/Watershed Protection Provisions of the Newton Revised Ordinances. Plaintiffs claim that they may obtain an annulment of the Order of Conditions under G.L.c. 249, 4 (certiorari), G.L.c. 231A, 1-9 (declaratory judgment), and G.L.c. 214, 7A (ten taxpayer suit).

For the following reasons, defendant's motion for summary judgment is ALLOWED.

BACKGROUND

Defendant Nicholas Heras, Jr. ("Heras") is the developer of a proposed three house residential subdivision in Newton called Laura Estates ("the Project"). It is **[*2]** undisputed that there have been problems with flooding in the area of the Project in the past. The land upon which the Project is proposed to be built is close to the Charles River, and a portion of the land is in a floodplain.

A proposed roadway to the three houses would cross the floodplain. Because the Project would effect the floodplain, Heras filed a Notice of Intent application with the Newton Conservation Commission ("the Commission"), the body which is empowered under the Newton Revised Ordinances to regulate the use of

floodplains within the city boundaries.

The Commission held six public hearings regarding the Project. The hearings concentrated upon the potential environmental impact of the Project, and focused in particular upon the effect that the Project would have upon drainage and flooding within the area. A civil engineer and an ecologist/wetlands expert testified at the hearings, and submitted exhibits. The testimony and exhibits explained how the Project could be built without decreasing drainage or increasing flooding in the floodplain area. After the six hearings and a period of review, the Commission issued an Order of Conditions which granted Heras permission **[*3]** to proceed with construction, provided that he abide by detailed construction requirements designed to prevent flooding and to improve drainage. The Order of Conditions was issued by a unanimous vote of five to zero.

The defendant has submitted the affidavit of a civil engineer, Robert Carter, who has twenty-seven years of experience in site/civil engineering, including subdivisions and draining. Carter, who appeared before the Commission at the hearings, stated in his affidavit that the roadway and drainage system at the site will actually improve drainage, that there will be compensatory flood storage for waters from the Charles River, and that there will be an unrestricted hydraulic connection from the river to the compensatory storage. His opinion is that the project will not result in any increase in flood levels on the project site, or in the surrounding areas.

The plaintiffs are residents of Newton who oppose the Project because they believe that it will result in increased flooding in the area, and that open space should be preserved. Only two of the plaintiffs (George and Edna Moody) live in the immediate vicinity of the Project. The closest that any other plaintiff **[*4]** lives to the Project is approximately 1/2 mile (Michael Collora). None of the plaintiffs are experts in flooding or drainage. They have retained no expert in these matters. In support of their allegation that the project will cause increased flooding, they offer only their own lay opinions that the construction of the roadway and the three houses will have such an effect.

DISCUSSION

HN1[↑] This court grants summary judgment where there are no genuine issues of material facts and where the summary judgment record entitles the moving party to judgment as a matter of law. *Cassesso v. Commissioner of Correction, 390 Mass. 419, 422, 456 N.E.2d 1123 (1983)*; *Community National Bank v. Dawes, 369 Mass. 550, 553, 340 N.E.2d 877 (1976)*; *Mass.R.Civ.P. 56(c)*. The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the moving party to judgment as a matter of law. *Pederson v. Time, Inc., 404 Mass. 14, 16-17, 532 N.E.2d 1211 (1989)*. The nonmoving party's failure to prove an essential element of its case "renders all other facts immaterial" and mandates summary judgment in favor of the moving party. **[*5]** *Kourouvacilis v. General Motors Corp., 410 Mass. 706, 711, 575 N.E.2d 734 (1991)*, citing *Celotex v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*.

A. Declaratory judgment

HN2[↑] Generally, only those who have themselves suffered legal harm, or who are in danger of suffering legal harm have standing to go forward with a claim. This "requirement of 'standing' is not avoided by a prayer for declaratory relief" under G.L.c. 231A, 1. [3] *Pratt v. Boston, 396 Mass. 37, 43, 483 N.E.2d 812 (1985)*, quoting *Doe v. The Governor, 381 Mass. 702, 704, 412 N.E.2d 325 (1980)*. Here, plaintiffs offer no proof of actual or potential harm, and have no reasonable expectation to do so. Their lay opinion that any construction on a floodplain will result in increased flooding is unsupported by any concrete evidence or scientific analysis, and is not sufficient to create a general dispute of material fact. In no way does any admissible evidence of the plaintiffs controvert the expert opinion of Mr. Carlson.

[*6] Because they cannot show any actual or potential injury or legal harm, the plaintiffs do not have standing to seek a declaratory judgment.

B. Certiorari

HN3[↑] A plaintiff may pursue "[a] civil action in the nature of certiori to correct errors in proceedings which are not according to the course of the common law." G.L.c. 249, 4 (1986 ed., Supp. 1995). In order for this

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[3] The relevant portion of the statute states that ". . . the superior court . . . may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not." G.L. c. 231A 1 (1986 ed.).

court to exercise its discretion to grant certiorari, the plaintiffs must demonstrate that the decision of the Commission "has resulted in substantial injury or manifest injustice" to them. *Fiske v. Board of Selectmen of Hopkinton, 354 Mass. 269, 271, 237 N.E.2d 15 (1968)*. An injury which is highly speculative is not sufficient for the court to grant certiori. *Id.* As set forth above, plaintiffs not only fail to provide evidence of substantial injury, they have no reasonable expectation to show even a likelihood of any injury. The nonexistence of evidence to support their allegation that the development will result in increased flooding is fatal.

C. Ten taxpayer suit:

HN4[↑] The superior court may grant injunctive relief in cases "in which not less than ten persons domiciled within the commonwealth are **[*7]** joined as plaintiffs," if "damage to the environment is occurring or about to occur" and the "damage caused or about to be caused . . . constitutes a violation of a statute, ordinance, by-law or regulation the major purpose of which is to prevent or minimize damage to the environment." G.L.c. 214, 7A (1986 ed.). Here, plaintiffs allege that damage to the environment is about to occur, and that such damage will be in violation of the Floodplain/Watershed Protection Provisions of the Newton Ordinances.

Though protection of the environment clearly is the major purpose of the Newton ordinances in question, plaintiffs fail to offer any evidence that would tend to show that damage to the environment is occurring, or is about to occur. The ten taxpayer statute states that "damage to the environment shall not include any insignificant destruction, damage or impairment to such natural resources." *Id.* The plaintiffs' failure to specify the nature of the alleged impact prevents them from establishing that any significant impact will occur. See *Walpole v. Secretary of the Executive Office of Environmental Affairs, 405 Mass. 67, 71, 537 N.E.2d 1244 (1989)*. In fact, there is no evidence in the record **[*8]** to show that any damage, significant or insignificant, has occurred or is about to occur. The uncontroverted evidence shows that the planned development in the present case is subject to a stringent plan designed to protect the environment, convincing this court that G.L.c. 214, 7A does not apply. See *Nantucket Land Council, Inc. v. Planning Board of Nantucket, 5 Mass. App. Ct. 206, 215-16, 361 N.E.2d 937 (1977)*. Absent any proof of damage to the environment, this court will not grant relief under G.L.c. 214, 7A.

ORDER

For the foregoing reasons, it is hereby ORDERED that summary judgment enter for defendants Newton Conservation Commission and Nicholas Heras, Jr.

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